DOCKET

(8)

No. 83-1750-CFY
Status: GRANTED

Title: United States, Petitioner
v.
James Rual Miller

Docketed:
April 27, 1984

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ladar, Jerrold M.

Entry	Date	Note	Proceedings and Orders
1	Apr 27 1984	G	Petition for writ of certiorari filed.
2	Jun 5 1984		DISTRIBUTED. September 24, 1984
3	Jun 13 1984	X	Brief of respondent James Rual Miller in opposition filed.
4	Jun 19 1984	X	Reply brief of petitioner United States filed.
5	Oct 1 1984		Petition GRANTED.
6	Nov 15 1984		Joint appendix filed.
7	Nov 15 1984		Brief of petitioner United States filed.
8	Nov 26 1984	G	Motion of respondent for leave to proceed further here in forma pauperis filed.
9	Nov 26 1984	G	Motion of respondent for appointment of counsel filed.
11	Dec 3 1984		DISTRIBUTED. December 7, 1984. (Motion of respondent f leave to proceed further herein in forma pauperis
12	Dec 3 1984		and motion of respondent for appointment of counsel).
13	Dec 4 1984		SET FOR ARGUMENT. Wednesday, January 16, 1985. (1st case).
14	Dec 10 1984		CIRCULATED.
15	Dec 10 1984		DISTRIBUTED. Jan. 4, 1985. (Motion for leave to proce futher herein in forma pauperis).
16	Dec 10 1984		DISTRIBUTED. Jan. 4, 1985. (Motion of responcent for appointment of counsel).
17	Dec 13 1984		Record filed.
18	Dec 27 1984	X	Brief of respondent James Rual Miller filed.
19	Jan 7 1985		Motion of respondent for leave to proceed further here in forma pauperis GRANTED.
20	Jan 7 1985		Motion for appointment of counsel GRANTED and it is ordered that Jerrold M. Ladar, Esquire, of San Francisco, California, is appointed to serve as counse for the respondent in this case.
21	Jan 9 1985	X	Reply brief of petitioner United States filed.
22	Jan 8 1985		Transcript of trial of USDC, N. Calif. received from
23	Jan 8 1985		U.S. Department of Justice and to be returned to them. (Volumes I, II, III and IV (CR-82-167C RFP)).
24	Jan 8 1985		LODGINGS received. To be returned to Dept. of Justice.
25	Jan 16 1985		ARGUED.

1 PP

PETITION FOR WRIT OF CERTIORARI

No. 83-1750

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

34 pp

QUESTION PRESENTED

Whether the Fifth Amendment right to be tried only on indictment by a grand jury requires that a court set aside a mail fraud conviction when the fraudulent scheme proved by the government at trial is somewhat narrower than the scheme alleged in the indictment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statute and rule:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 715 F.2d 1360.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1983. A petition for rehearing was denied on March 21, 1984 (App., *infra*, 9a-10a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, respondent was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of two years' imprisonment on each count.

1. Respondent was the owner of San Francisco Scrap Metals, Inc., a company that regularly purchased scrap wire and stripped, baled and resold it. On the morning of July 15, 1981, respondent reported that his business had been burglarized the previous evening. He informed police that two trucks and 201,000 pounds of copper wire had been stolen. Several weeks earlier respondent had increased the insurance coverage for his business from $50,000 to $150,000 for the two-week period ending July 15, 1981. Following the burglary, respondent mailed to Aetna Insurance Company a proof of loss that represented, inter alia, that he had lost 201,000 pounds of copper as a result of the burglary. Respondent received $100,000 from Aetna in compensation for the loss, $50,000 of which was sent to him through the mail. App., *infra*, 2a-3a.

The evidence indicated that respondent had inflated the amount of copper he reported to Aetna as stolen. Respondent's account of the source of the copper did not coincide with the facts. On July 20 respondent reported to the insurance adjuster that the missing copper had been purchased from L.K. Comstock, Inc., and from Kingston Electric. Kingston Electric in fact had sold a quantity of copper to respondent's company, but the latter had resold a similar quantity of copper to Battery Salvage Company. Respondent contended that the copper sold to Battery Salvage had

been purchased from Brayer Electric. However, neither Brayer Electric nor L.K. Comstock had sold respondent's company the copper respondent claimed to have purchased from them. App., *infra*, 3a. Several of respondent's employees who were working on the day of the burglary testified that there was "no way" respondent had anything close to 201,000 pounds of copper on hand.

2. The indictment charged respondent with three counts of mail fraud, in violation of 18 U.S.C. 1341. Count one was based on respondent's placement of the proof of loss in the mail, and count two was based on his causing the mailing of the $50,000 check from Aetna. Count three, which was based on the other $50,000 check, was dismissed on the government's motion before trial.

The scheme alleged in each count of the indictment was described in paragraphs one through seven of count one. Those paragraphs alleged, inter alia, that it was a part of the scheme that respondent knew of the burglary and consented to it for the purpose of obtaining the insurance proceeds and that it was also a part of the scheme that he grossly inflated the amount of copper allegedly taken during the burglary.[1]

---

[1] Paragraphs one through seven of count one of the indictment read as follows:

> 1. Beginning on or about July 2, 1981 and continuing to on or about October 26, 1981, in the City and County of San Francisco, in the State and Northern District of California,
>
> JAMES RUAL MILLER,
>
> defendant herein, being the President of San Francisco Scrap Metal, Inc., did devise and intend to devise a scheme and artifice to defraud and to obtain money by means of

At trial, the government presented the evidence that respondent had grossly inflated the amount of copper taken. However, it did not produce any evidence that respondent knew in advance about the burglary and consented to it. At the close of the government's evidence, the prosecutor moved to strike the "false burglary" allegation from the indictment. Respondent opposed the motion on the ground that the "false burglary" was part of the scheme alleged in the indictment. The court denied the government's

---

false and fraudulent pretenses and representations from Aetna Insurance Company by making a fraudulent insurance claim for a loss due to an alleged burglary at San Francisco Scrap Metal.

2. At the time such pretenses and representations were made, defendant well knew them to be false. The scheme, so devised and intended to be devised, was implemented in substance as follows:

3. It was a part of the scheme that on or about July 2, 1981, defendant would and did increase his insurance policy coverage from $50,000 to $150,000 to be in effect for a two week period ending July 15, 1981.

4. It was a further part of the scheme that on or about July 15, 1981, defendant would and did report that a burglary had occurred at San Francisco Scrap Metal during the evening of July 14, 1981.

5. It was a further part of the scheme that defendant would and did claim to have lost 210,170 pounds of copper wire, worth $123,500 and two trucks during the alleged burglary.

6. It was a further part of the scheme that defendant well knew that the alleged burglary was committed with his knowledge and consent for the purpose of obtaining the insurance proceeds.

7. It was a further part of the scheme that defendant well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company.

motion to strike. Respondent then moved for a judgment of acquittal on the ground that the government had failed to prove that there was any scheme and artifice to defraud. The court denied that motion. Respondent renewed his motion at the close of all the evidence, contending that, since the government had failed to prove consent to the burglary, there was insufficient evidence to support the "unitary, single scheme and artifice alleged" and thus a "fatal variance" (Reporter's Partial Tr. 4). The court reserved a ruling on the motion. The court instructed the jury that the government was required only to prove one or more of the acts charged in the indictment in order to show the existence of the scheme. The jury rendered a guilty verdict on both counts. The court subsequently denied the motion for a judgment of acquittal.

3. The court of appeals vacated the convictions (App., *infra*, 1a-8a). Citing a standard it had articulated in *United States* v. *Mastelotto*, 717 F.2d 1238 (9th Cir. 1983), the court concluded that respondent's convictions could not stand because the petit jury convicted respondent for a scheme to defraud Aetna by inflating the amount of the claimed loss, while the grand jury indicted on the basis of a scheme consisting of both the inflated claim and respondent's knowing consent to the burglary. The court opined that "[t]he grand jury may well have declined to indict [respondent] simply on the basis of his exaggeration of the amount of his claimed loss" (App., *infra*, 7a). The court characterized respondent's convictions as "predicated on a substantially different scheme from that pleaded in the indictment" (*id.* at 8a).

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that respondent's convictions must be vacated because the government failed to prove at trial every feature of the fraudulent scheme alleged in the indictment represents a radical departure from longstanding and well-established legal principles. Until the decisions in this case and in *United States* v. *Mastelotto*, 717 F.2d 1238 (9th Cir. 1983), courts uniformly permitted departure from the terms of an indictment at trial when the effect was to *narrow* the charges against the defendant. Under this case and *Mastelotto*, however, proof that is narrower than the original charges will be adjudged insufficient—despite the fact that the petit jury concludes that that proof establishes that the defendant violated the statute referred to in the indictment in a manner charged by the indictment—if the court considers it possible that the grand jury might have chosen not to indict on the basis of the more limited proof.

The standard articulated by the court of appeals bears no relation to the purposes served by the constitutional right to indictment by a grand jury; indeed, the court appears to have confused the distinct functions of the grand jury and the petit jury. The principle applied in this case is an exceedingly expansive one and has serious potential for impairing the government's ability to prosecute both fraud and other types of cases. Indeed, we believe that, in terms of its practical application, the decision below is potentially one of the most troublesome we have presented for review by this Court in a criminal case in recent years. A district court has already invoked *Mastelotto* and the decision below as the basis for dismissal of a major fraud prosecution in the Northern District of California. We believe application of

the principle stated in this case is virtually certain to result in dismissal of other important prosecutions in the Ninth Circuit. Review by this Court is therefore warranted.

1. There is no question that at trial respondent was shown to have violated the mail fraud statute. Neither the court of appeals nor respondent has taken issue with the jury's conclusion that the government proved those violations beyond a reasonable doubt. Nor is there any dispute that respondent engaged in a fraudulent scheme involving submission of an inflated insurance claim for the value of allegedly stolen copper and that he used the mails in furtherance of that scheme. Finally, there is no question that everything that was proved at trial was encompassed within the allegations contained in the indictment.

The court of appeals nevertheless held that respondent's convictions could not stand because the scheme the government proved at trial lacked one feature—advance knowledge of, and consent to, the burglary—of the scheme described in the indictment. The court reasoned that "[t]he grand jury may well have declined to indict [respondent] on the basis of his exaggeration of the amount of his claimed loss," citing *Mastelotto* (App., *infra*, 7a). The court cited *Mastelotto* for the proposition that "the petit jury must find that the defendant participated in the overall scheme alleged by the grand jury because the court could not be certain that the grand jury would have indicted on the basis that the defendant participated in only part of the scheme" (App., *infra*, 6a). The court also relied (*ibid.*) on the statement in *Mastelotto* that a defendant's Fifth Amendment right to be tried for a crime for which he has previously been indicted by a grand jury compels the conclusion that "[a] defendant cannot be convicted of a count charging par-

ticipation in a fraudulent scheme Y where the grand jury indicted based on his participation in a fraudulent scheme X, *even if the schemes themselves overlap or are concentric*" (717 F.2d at 1248-1249 (emphasis added)). In apparent reliance on the *Mastelotto* court's reference to "concentric" schemes, the court in this case held that the government may not prove a scheme that falls entirely within the bounds of the description in the indictment, but is in one respect *narrower* than the scheme charged.

In so holding, the court of appeals departed from a uniform line of authority based on the decisions of this Court and of every court of appeals. Until now, it has been clear that the allegations in an indictment need not match the evidence at trial when the effect of the disparity is only to narrow the charges against a defendant. Under this "ameliorating doctrine," "a portion of an indictment that the evidence does not support may be withdrawn from the jury, and this is not an impermissible amendment, provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense." 1 C. Wright, *Federal Practice & Procedure* § 127, at 422 (2d ed. 1982).

This Court in *Salinger* v. *United States*, 272 U.S. 542 (1926), applied this well-established principle. In *Salinger*, a mail fraud case, the indictment charged a scheme to defraud that "comprehended several relatively distinct plans for fleecing intended victims" (*id.* at 548). The trial court withdrew from the jury all of the plans except one, on the ground that they were without support in the evidence. The Supreme Court rejected the defendant's challenge to the withdrawal of a portion of the charge, holding that "it did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision that 'no person shall be held to answer for

a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.'" *Id.* at 549 (citations omitted).[2] The Court has also held that unnecessary allegations that are included in the indictment may be ignored and that this does not constitute an impermissible amendment of the indictment. See *Ford* v. *United States*, 273 U.S. 593, 602 (1927) (useless averment that a conspiracy violated provisions of a treaty). See also *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 250 (1940) (where an indictment charges various means by which a conspiracy is effectuated, not all of them need be proved).

Every court of appeals has concluded that narrowing of charges to fit the proof at trial does not violate a defendant's right to be tried for the crime for which he was indicted, so long as the remaining allegations state an offense. See, *e.g.*, *New England Enterprises, Inc.* v. *United States*, 400 F.2d 58, 64-65 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969); *United States* v. *Heimann*, 705 F.2d 662, 669 (2d Cir. 1983); *United States* v. *Milestone*, 626 F.2d 264 (3d Cir.), cert. denied, 449 U.S. 920 (1980); *United States* v. *Coward*, 669 F.2d 180, 183-184 (4th Cir.), cert. denied, 456 U.S. 946 (1982); *United States* v. *Salinas*, 654 F.2d 319, 325 (5th Cir. 1981); *Gambill* v. *United States*, 276 F.2d 180, 181 (6th Cir. 1960); *United States* v. *Spector*, 326 F.2d 345, 347-348 (7th Cir. 1963); *Mellor* v. *United States*, 160 F.2d 757 (8th Cir.), cert. denied, 331

---

[2] It appears that in *Salinger* the defendant himself requested at trial that the unproved plans be withdrawn from the jury. However, there is no indication that the Court relied on any theory of waiver in concluding that the trial court's action did not violate the Fifth Amendment.

U.S. 848 (1947); *United States* v. *Dawson*, 516 F.2d 796, 801-802 & n.4 (9th Cir.), cert. denied, 423 U.S. 855 (1975); *United States* v. *Whitman*, 665 F.2d 313, 316-318 (10th Cir. 1981); *United States* v. *Diaz*, 690 F.2d 1352, 1356 (11th Cir. 1982); *United States* v. *Conlon*, 661 F.2d 235, 238-239 (D.C. Cir. 1981), cert. denied, 454 U.S. 1149 (1982).

At most, courts have analyzed the effective narrowing of charges to fit the proof at trial as a variance. Even when the proof shows *more* than what is alleged in the indictment, a variance by itself is not fatal to a judgment of conviction. "The true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 82 (1935) (quoting former 28 U.S.C. 391). See also *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946); Fed. R. Crim. P. 52(a). Here the court did not even suggest that it would be appropriate to consider whether respondent had suffered any prejudice from the fact that the government proved somewhat less than what was charged in the indictment. Instead, it simply concluded that in view of the government's failure to prove respondent's consent to the burglary, the conviction could not stand.

The court of appeals' holding also runs counter to well established pleading practices. Indictments normally are drafted broadly in order to encompass all of the proof the government hopes to present at the time of trial. In many cases, for a variety of reasons, less than all of the anticipated evidence is eventually introduced at trial. A witness may change his story at or prior to trial or decide at the last minute not to cooperate with the government. Witnesses may die between indictment and trial, or the prosecutor may

conclude that a grand jury witness would not be effective at trial. The prosecutor may conclude that the available proof is not sufficiently convincing to establish some aspect of the charged scheme or that the attempt to prove it would be unduly time-consuming, confusing, or distracting from the proof of the main core of the offense. And it is always possible that the trial court will exclude evidence that was presented to the grand jury.

In addition, it is common practice to draft indictments conjunctively, *e.g.*, to allege that the scheme in which a defendant was involved had objects A *and* B *and* C, even when it is doubtful whether it will be possible to prove all three objects under the higher standard of proof at trial.[3] In the past, it has been clear that the government could obtain a conviction even if it proved only one of the objects alleged, one of the means alleged, one of the overt acts alleged, and so on. Indeed, this Court has stated, "[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner* v. *United States*, 396 U.S. 398, 420 (1970).[4]

---

[3] Indeed, it is often thought preferable to draft an indictment conjunctively, since disjunctive pleading (*i.e.*, the object of the scheme was A *or* B *or* C) might be interpreted as reflecting the grand jury's inability to agree. See, *e.g.*, *Mellor* v. *United States*, 160 F.2d at 760-761.

[4] See also, *e.g.*, *Crain* v. *United States*, 162 U.S. 625, 634-636 (1896); *United States* v. *Toney*, 598 F.2d 1349, 1355-1357 (5th Cir. 1979), cert. denied, 444 U.S. 1033 (1980); *United States* v. *Abascal*, 564 F.2d 821, 832 (9th Cir. 1977), cert. denied, 435 U.S. 942, 953 (1978); *United States* v. *Cioffi*, 487 F.2d 492, 499 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974); 2 E. Devitt & C. Blackmar, *Federal Jury Practice & Instructions* § 54.18 (3d ed. 1977). And see Seventh Circuit Judicial Conference,

The trial court in this case instructed the jury on the basis of this principle. The decision of the Ninth Circuit, however, implicitly rejects the general rule in holding that the government may not rely on proof of one feature of a scheme (inflation of the value of copper taken) when the indictment charges a scheme with two features (inflation of the value of the copper and consent to the burglary).

The court of appeals in this case and in *Mastelotto* based its analysis largely on *Ex parte Bain*, 121 U.S. 1 (1887), and on passages from *Stirone* v. *United States*, 361 U.S. 212 (1960), that rely heavily on *Bain*. But *Bain* and *Stirone* do not support the broad principle embraced by the court of appeals. *Bain* involved an actual physical amendment to the indictment. This Court recently noted that *Bain* "was long ago limited to its facts by *Salinger* v. *United States*, 272 U.S. 542 (1926)." *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 2 n.2. See also *id.*, slip op. 5 n.5 (Brennan, J., dissenting) (describing the holding in *Salinger* that the trial court may omit a charge not supported by the evidence at trial as stating an "unsurprising rule"). As for *Stirone*, it is clearly distinguishable from this case. There the trial court instructed the jury that it could find interference with either interstate movement of steel or interstate movement of sand (both of which the government had attempted to prove at trial), although the indictment charged only interference with interstate movement of sand. Thus, under the instructions given, the jury could have found

---

Manual on Jury Instructions in Federal Criminal Cases § 16.02, *reprinted in* 36 F.R.D. 601 (1965) ("Nor is it necessary that the Government prove all of the pretenses, representations and acts charged in the [mail fraud] indictment. It is essential only that one or more of them be proved to show the existence of the scheme.").

facts that were entirely outside the scope of what was charged in the indictment. In contrast, all of the proof in this case came within the scope of what was charged.

The decision below reflects the confusion—originating largely with *Ex parte Bain*—that has long existed in the federal courts concerning the extent to which proof at trial may deviate from what is charged in the indictment. The courts of appeals have noted the persistence of this confusion. See, *e.g.*, *United States* v. *Cina*, 699 F.2d 853, 857-858 (7th Cir. 1983), cert. denied, No. 83-28 (Nov. 28, 1983); *United States* v. *Dawson*, 516 F.2d at 801-804; *United States* v. *Cirami*, 510 F.2d 69, 72 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *Heisler* v. *United States*, 394 F.2d 692, 695-696 (9th Cir.), cert. denied, 393 U.S. 986 (1968) ("the progeny of *Bain* are out of joint"). This Court on several occasions has sought to limit *Bain* to its facts (see page 12, *supra*). Nevertheless, as this case demonstrates, some courts continue to regard *Bain* as good authority for broad propositions that this Court has rejected elsewhere. To the extent the confusion persists, we suggest that this case presents an opportunity for the Court to clarify the status of *Bain* and of the related language from Justice Black's opinion in *Stirone*, on which the court below relied.[5]

---

[5] The opinion below seems to suggest that the issue here is simply one of the sufficiency of the evidence—*i.e.*, did the government succeed in establishing the scheme it set out to prove? But the legal principle at stake here has nothing to do with the legal sufficiency of the evidence to prove mail fraud. To the contrary, the holding is a broad one that ultimately rests on the dictum in *Mastelotto*, which in turn was premised on the court's understanding of the Fifth Amendment right to be tried on an indictment by a grand jury.

The court in *Mastelotto* purported to distinguish some of the cases we have cited here on various grounds. We believe,

2. The holding in this case rests on a significant misperception of the role of the grand jury and the purposes served by the Fifth Amendment right to be tried on an indictment. In our system of criminal justice the grand jury and the petit jury serve different functions. The grand jury makes a preliminary determination that there is probable cause to believe the defendant has committed a crime—the necessary predicate to a criminal prosecution. The petit jury makes the actual determination of guilt beyond a reasonable doubt.

The requirement of indictment by a grand jury, based on a standard of probable cause, serves as a protection against oppressive and unwarranted criminal prosecutions. *Costello* v. *United States*, 350 U.S. 359, 362 (1956). In addition, the indictment provides notice to the defendant of the charges against him so that he can prepare a defense. *Russell* v. *United States*, 369 U.S. 749, 763, 766 (1962).[6] Here there is no doubt that the grand jury found probable cause to believe respondent had committed mail fraud —the crime for which he was eventually convicted. And respondent clearly had sufficient notice of the charges against him to permit him to prepare his defense, since everything the government proved at

however, that the holding in this case would necessarily compel a different result from that reached in cases like *Salinger* and the others we have cited. In any of those cases the convictions could have been reversed on the ground cited here—that the grand jury might have chosen not to indict if it had had narrower evidence before it.

[6] An indictment also helps to ensure that a defendant will not be placed in jeopardy twice for the same offense. *Russell* v. *United States*, 369 U.S. at 764. There is clearly no threat to this function in cases in which the proof at trial falls entirely within the scope of what is alleged in the indictment.

trial was within the scope of the charge in the indictment.[7]

The standard the court of appeals applied in this case—whether there was some possibility that the grand jury might have chosen not to indict if it had considered a narrower scheme—seriously distorts and confuses the respective functions of the grand jury and the petit jury. Here the petit jury found that the evidence established *beyond a reasonable doubt* that respondent committed mail fraud. Once the petit jury made that finding, the grand jury's decision whether to indict became largely irrelevant.[8] But in vacating respondent's convictions, the court of appeals discounted entirely the petit jury's finding of guilt beyond a reasonable doubt. Instead, the court

[7] There might conceivably be cases in which the scheme charged in the indictment and the narrower scheme proved at trial would differ so greatly in emphasis that a defendant could claim that his ability to prepare a defense was impaired. In such cases it normally should be a sufficient remedy to grant a continuance to allow the defendant to investigate further the areas on which the government has focused at trial.

It seems clear that respondent did not suffer prejudice from narrowing of the scheme charged in this case. Respondent's inflation of the amount of copper in connection with the filing of his insurance claim was a central feature of the relatively simple scheme charged and by itself accounted for virtually the entire pecuniary loss suffered by the insurance company against which his scheme was directed. Respondent therefore was on notice that he should address that issue at trial.

[8] Indeed, if, as is settled (*Costello* v. *United States*, 350 U.S. at 363), an indictment by a competent and unbiased grand jury may not be challenged on the basis of the nature or sufficiency of the evidence on which it is based, it is hard to understand why an otherwise valid conviction can be defeated by speculation about how the grand jury would have reacted to the evidence adduced at the trial.

placed decisive weight on improbable speculation that the grand jury (apparently on the basis of leniency) might not have made the preliminary determination of *probable cause* if it had considered only the evidence that was presented to the petit jury—even though there is no reason to doubt that probable cause to charge the respondent with the crime of which he was convicted must have been demonstrated.

The court of appeals' holding elevates the role of the grand jury far beyond its normal functions of screening and notice. In effect, the court has given the grand jury a status equal to that of the petit jury. Under the decision below, the government must shift its primary focus to the grand jury and must be prepared to prove beyond a reasonable doubt every allegation made at that early stage in order to ensure that a later conviction by the petit jury will survive. That is surely an instance of the tail wagging the dog.

3. The expansive principle advanced in *Mastelotto* and applied in this case creates enormous practical problems for the government. The court of appeals' test—whether there is some possibility that the grand jury might have chosen not to indict if it had considered only the narrower scheme proved at trial—amounts to a sword of Damocles that threatens virtually every fraud prosecution in the Ninth Circuit. Many fraud cases involve allegations of complex schemes with numerous features; as we explained above, the government, for any number of practical reasons, often will be unable to prove at trial each and every allegation contained in the indictment, even though the evidence it does present is clearly sufficient to prove that the defendant violated the law. No matter how strong the evidence at trial, it would be open to the court to dismiss the conviction if it could

speculate that the grand jury might have chosen not to indict on the basis of the narrower scheme. Indeed, this case demonstrates that the principle is not confined to complex cases. The scheme alleged here was a simple one, and its central feature—filing of an inflated insurance claim—was proved at trial. It strains credulity to suggest that the grand jury would not have indicted based on a scheme involving respondent's gross inflation of the amount of copper he had on hand, when that action alone was both criminal and by itself sufficient to account for virtually the entire loss suffered by the victim. Nevertheless, because the government failed to present evidence addressed to one secondary allegation—consent to the burglary—the court proceeded to vacate respondent's convictions.

The potential for harm is not limited to fraud cases. Indictments in many sorts of cases may include multiple allegations, not all of which are necessary to prove the crime charged. For example, a conspiracy indictment may list 30 overt acts, or a racketeering indictment may list 12 acts of racketeering. If the government were able to prove only 25 of the overt acts, or ten of the racketeering acts, a court following the decision below could reverse the convictions on the ground that it was not certain that the grand jury would have decided to indict if it had considered the more limited list of acts proved at trial. Indeed, the court's logic would appear virtually to compel reversal of a conviction on a lesser included offense where the evidence on the greater offense charged is defective.

Our concern about the potential impact of the decision below is not purely speculative. A district court in the Northern District of California recently terminated an exceptionally important fraud prosecution

on the authority of *Mastelotto* and this case. In *United States* v. *Dorfman*, No. CR-83-0008-WHO (N.D.Cal. Mar. 27, 1984), the trial court granted a mid-trial motion for judgments of acquittal on 12 substantive fraud counts and one conspiracy count, on the ground that a "fatal variance" resulted when the government proved some, but not all, of the objects of the fraudulent scheme alleged in the indictment.[9] Other defendants, both in the Ninth Circuit and elsewhere, are raising claims based on *Mastelotto* and the decision below. See, *e.g.*, *United States* v. *Gaultier*, 727 F.2d 711, 715 n.6 (8th Cir. 1984).[10] We believe it is only a matter of time before there are other "acquittals" based on the rule the court of appeals applied in this case.

The practical difficulties created by the decision below are magnified by the nature of the remedy suggested by the decision. Because the court of appeals

[9] The indictment in *Dorfman* charged that defendants' objectives included, inter alia, defrauding various union local benefit plans. The court concluded that the government had not presented sufficient proof as to some of the benefit plans.

We are lodging with the Clerk of the Court and providing to respondent's counsel copies of the district court's order granting judgment of acquittal in *Dorfman*.

[10] See also *United States* v. *Fischbach & Moore, Inc.*, No. CR 83-169C (W.D. Wash.) (transferred to District of Montana for trial), in which electrical contractors were acquitted on Sherman Act bid rigging charges in January 1984 following the trial court's instruction that if the jury found "a conspiracy involving only one or two of these electrical contracts, but not all three contracts, then you must find the defendants not guilty." The defendants cited *Mastelotto* in support of the giving of such an instruction. Cf. *United States* v. *Von Stoll*, 726 F.2d 584, 590 n.1 (9th Cir. 1984) (Poole, J., concurring and dissenting) (characterizing the reasoning of *Mastelotto* and the decision below as "unsound").

characterizes narrowing of the charges as a failure of proof, courts may be prompted to enter judgments of "acquittal" in cases like this one, as did the trial court in *Dorfman*. Defendants undoubtedly will contend that double jeopardy principles prevent reindictment and retrial in such cases; indeed, we are advised that the defendants in *Dorfman* have moved to dismiss the government's appeal in that case on double jeopardy grounds. While we believe the "error" in such cases is more akin to a defect in the indictment than to a failure of proof, so that retrial on a new and more limited indictment would not be barred, we cannot be assured that our contention will prevail.[11] Even if we prevailed on the double jeopardy issue, the decision below would cause significant practical problems. The government would be faced with reindicting and retrying defendants again and again until it succeeded in achieving the correct match between the description in the indictment and the proof at trial.

There is no ready solution that would allow the government to escape these practical consequences. It will rarely be possible to present precisely the same evidence to the grand jury that is eventually introduced at trial. As a result, the government would be forced to attempt to confine the descriptions in the indictment to those allegations it believes with some certainty that it could prove beyond a reasonable doubt at trial. Such bare bones pleading would provide less notice to the accused of the nature of the

[11] It is unclear in the instant case whether the court of appeals' decision is meant to leave room for the government to secure a new indictment describing respondent's scheme more narrowly and to place respondent on trial to prove again the mail fraud he was found to have committed, by legally sufficient evidence, at his original trial.

charges against him and might prevent the government from introducing at trial clearly relevant evidence that was obtained after indictment. Alternatively, the government might attempt to draft an indictment so that various features of a scheme would be alleged in separate counts (*e.g.*, fraud based on a scheme involving inflation of the value of copper, and fraud based on a different scheme involving consent to burglary). That sort of cumbersome and multiplicitous pleading surely would be subject to attack by defendants and in any event would be an undesirable practice. In short, the decision below creates a dilemma that is virtually certain to undermine significantly the government's ability to prosecute effectively in many important criminal cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

APRIL 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 82-1670

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES RUAL MILLER, DEFENDANT-APPELLANT

Argued and Submitted May 13, 1983

Decided Sept. 13, 1983

Appeal from the United States District Court
for the Northern District of California

Before PECK *, FLETCHER and PREGERSON, Circuit Judges.

JOHN W. PECK, Circuit Judge:

A three-count indictment issued in the Northern District of California against James Rual Miller on June 30, 1982, charging Miller with mail fraud in

---

* Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

violation of 18 U.S.C. § 1341.[1] Central to each count of the indictment was the allegation that Miller devised a scheme and artifice to defraud Aetna Insurance Company by making a fraudulent insurance claim for a loss arising from an alleged burglary committed with Miller's knowledge and consent. The issue raised by Miller in this appeal is whether his jury conviction on the first two counts may be sustained where the government failed to prove that he procured, consented to or knew of the burglary, even though it did prove the allegation that Miller inflated the amount of his claimed loss. Because we conclude that the government failed to prove the scheme pleaded in the indictment, we reverse Miller's conviction.

The parties have stipulated to the following facts. Miller was the owner of San Francisco Scrap Metals,

---

[1] 18 U.S.C. § 1341 reads as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Inc., a company that regularly purchased scrap wire, and stripped, baled and resold it. On July 2, 1981, Miller increased his company's insurance coverage from $50,000 to $150,000 for a two-week period ending July 15, 1981. On the morning of July 15, 1981, Miller reported that his business had been burglarized the previous evening and that two trucks and 201,000 pounds of copper wire had been stolen. On July 20, 1981, Miller reported to the insurance adjuster that the missing copper had been purchased from L.K. Comstock, Inc. and Kingston Electric. Kingston Electric had sold a quantity of copper to San Francisco Scrap Metals but a similar quantity had been resold to Battery Salvage Company. Miller claimed that the copper sold to Battery Salvage had been purchased from Brayer Electric. Neither Brayer Electric nor L.K. Comstock sold San Francisco Scrap Metals the copper claimed to have been purchased. Miller sent his proof of loss to Aetna through the United States Mail. Miller received $100,000. One $50,000 check was sent by Aetna to Miller through the mail.

The scheme and artifice alleged in each count of the indictment is set forth in paragraphs one through seven of the first count. Those paragraphs read as follows:

> 1. Beginning on or about July 2, 1981 and continuing to on or about October 26, 1981, in the City and County of San Francisco, in the State and Northern District of California,
>
> JAMES RUAL MILLER,
>
> defendant herein, being the President of San Francisco Scrap Metal, Inc., did devise and intend to devise a scheme and artifice to defraud

and to obtain money by means of false and fraudulent pretenses and representations from Aetna Insurance Company by making a fraudulent insurance claim for a loss due to an alleged burglary at San Francisco Scrap Metal.

2. At the time such pretenses and representations were made, defendant well knew them to be false. The scheme, so devised and intended to be devised, was implemented in substance as follows:

3. It was a part of the scheme that on or about July 2, 1981, defendant would and did increase his insurance policy coverage from $50,000 to $150,000 to be in effect for a two week period ending July 15, 1981.

4. It was a further part of the scheme that on or about July 15, 1981, defendant would and did report that a burglary had occurred at San Francisco Scrap Metal during the evening of July 14, 1981.

5. It was a further part of the scheme that defendant would and did claim to have lost 210,170 pounds of copper wire, worth $123,500 and two trucks during the alleged burglary.

6. Is was a further part of the scheme that defendant well knew that the alleged burglary was committed with his knowledge and consent for the purpose of obtaining the insurance proceeds.

7. It was a further part of the scheme that defendant well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company.

Count one alleged a violation of § 1341 by Miller's placement of the "proof of loss" in the mail. Count two alleged a violation of § 1341 by his "knowingly and wilfully caus[ing] to be placed in an authorized depository for mail matter of the United States Postal Service an envelope containing a check for $50,000 from Aetna Insurance Company." Count three was dismissed upon the government's motion prior to trial.

Miller was tried before a jury in August 1982. The government did not introduce any evidence that Miller knew of or consented to the July 14, 1981 burglary. At the close of the government's case, the government moved to strike paragraph six of the indictment, *i.e.*, the "false burglary" allegation. Defense counsel opposed the motion on the ground that the "false burglary" was part of the scheme alleged in the indictment. The court denied the government's motion as well as a motion for acquittal made by the defense counsel. The jury rendered a guilty verdict on each of the two remaining counts. The trial court denied defense counsel's post-verdict motion for acquittal. Miller was sentenced to concurrent terms of two years imprisonment on each count.

Miller filed a timely appeal of the judgment. On appeal, Miller contends that in the indictment the government pleaded a single, unitary scheme to defraud involving a false burglary which it failed to prove. Miller further contends, and the government does not dispute, that at most the evidence established that Miller had fraudulently inflated his claim. Miller then concludes that the government failed to prove the offense as charged in the indictment and that to the extent the government did prove mail fraud, it did so on a theory so different from that

pleaded in the indictment that Miller's conviction cannot be sustained.

We find Miller's argument persuasive. As an initial point, the government concedes that the indictment charged Miller with violating § 1341 by devising a scheme to defraud Aetna Insurance Company by knowing of and consenting to the burglary and by inflating the amount of the claimed loss. (Gov't brief at 3). Moreover, the government does not dispute that it did not prove that Miller knew of or consented to the burglary from which the claim arose. Accordingly, the petit jury convicted Miller for devising a scheme to defraud Aetna by inflating the amount of the claimed loss even though the grand jury indicted on the basis of a scheme to defraud consisting not only of the inflated claim but also of Miller's knowing consent to the burglary.

In such circumstances a conviction cannot stand. In *United States v. Mastelotto*, 717 F.2d 1238 (9th Cir. 1983), this court held that "[a mail fraud] defendant cannot be convicted of a count charging participation in a fraudulent scheme *Y* where the grand jury indicted based on his participation in a fraudulent scheme *X*, even if the schemes themselves overlap or are concentric." 717 F.2d at 1248-49. The court explained that in a mail fraud case the petit jury must find that the defendant participated in the overall scheme alleged by the grand jury because the court could not be certain that the grand jury would have indicted on the basis that the defendant participated in only part of the scheme. *Id.* at 1248-49 & nn. 10 & 11. *See Stirone v. United States*, 361 U.S. 212, 216-17, 80 S.Ct. 270, 272-273, 4 L.Ed.2d 252 (1960) (quoting *Ex parte Bain*, 121 U.S. 1, 13, 7

S.Ct. 781, 787, 30 L.Ed. 849 (1887)); *United States v. Pazsint*, 703 F.2d 420, 423 (9th Cir. 1983).

The reasoning underlying *Mastelotto* controls this case. The grand jury may well have declined to indict Miller simply on the basis of his exaggeration of the amount of his claimed loss. *See Mastelotto, supra, slip op.* at 1250. In fact, it is quite possible that the grand jury would have been unwilling or unable to return an indictment based solely on Miller's exaggeration of the amount of his claimed loss even though it had concluded that an indictment could be returned based on the overall scheme involving a use of the mail caused by Miller's knowing consent to the burglary. *Id.* (citing *Stirone, supra*, 361 U.S. at 217, 80 S.Ct. at 273). Accordingly, Miller's conviction cannot stand because he was convicted of offenses not only for which he was not indicted but also for which we cannot say that he would have been indicted.

A contrary result is not required by our cases holding that the government need not prove every fraudulent act or statement alleged in the indictment as demonstrating the fraudulent nature of the scheme charged. *See United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979); *United States v. Outpost Development Co.*, 552 F.2d 868, 869-70 (9th Cir. 1977), *cert. denied*, 434 U.S. 965 (1977). The existence of a scheme to defraud is an element of the crime of mail fraud. *Beecroft*, 608 F.2d at 757. The government must prove false statements or fraudulent acts in order to show the defendant's specific intent to defraud. *Id.* These cases simply hold that the government's proof of fraudulent intent may be sufficient even if it does not prove

every fraudulent act alleged in the indictment. Nothing in them conflicts with the principle that the jury must find the existence of substantially the same fraudulent scheme as that charged by the grand jury. Because, as noted above, there can be no dispute that Miller's conviction was predicated on a substantially different scheme from that pleaded in the indictment, the conviction cannot stand.

For the foregoing reasons, the judgment of conviction is vacated.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1670

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES RUAL MILLER, DEFENDANT-APPELLANT

[Filed Mar. 21, 1984]

ORDER

Before: PECK,* FLETCHER and PREGERSON, Circuit Judges

The panel in the above case has voted to deny the petition for rehearing; Judges Fletcher and Pregerson have voted to reject the suggestion for rehearing en banc and Judge Peck so recommended.

The suggestion for en banc review has been considered by the active circuit judges, the majority of

---

* Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

whom have voted not to hear the cause en banc. The en banc suggestion is hereby rejected.

The opinion dated September 13, 1983 is modified to substitute the following for the penultimate paragraph on page 1363, 715 F.2d 1360 (1983):

> A contrary result is not required by our cases holding that the government need not prove every fraudulent act or statement alleged in the indictment as demonstrating the fraudulent nature of the scheme charged. *See United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979); *United States v. Outpost Development Co.*, 552 F.2d 868, 869-70 (9th Cir. 1977), *cert. denied*, 434 U.S. 965 (1977). The existence of a scheme to defraud is an element of the crime of mail fraud. *Beecroft*, 608 F.2d at 757. The government must prove false statements or fraudulent acts in order to show the defendant's specific intent to defraud. *Id.* These cases simply hold that the government's proof of fraudulent intent may be sufficient even if it does not prove every fraudulent act alleged in the indictment. Nothing in them conflicts with the principle that the jury must find the existence of substantially the same fraudulent scheme as that charged by the grand jury. Because, as noted above, there can be no dispute that Miller's conviction was predicated on a substantially different scheme from that pleaded in the indictment, the conviction cannot stand.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 531

OPPOSITION

BRIEF

SC 1 PAGE 2

B

No. 83-1750

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR JAMES RUAL MILLER

JERROLD M. LADAR
Attorney at Law
507 Polk Street, Suite 310
San Francisco, CA. 94102
Telephone: (415) 928-2333

Counsel for
JAMES RUAL MILLER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STANDARDS AND STATUTES

No. 83-1750

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR JAMES RUAL MILLER
IN OPPOSITION

Petitioner was indicted in the Northern District of California and charged with three counts of mail fraud, 18 USC §1341, arising out of one scheme and artifice to defraud: "...defendant

herein did devise and intend to devise a scheme and artifice to defraud and obtain money by means of false and fraudulent pretenses and representations from Aetna Insurance Co. by making a fraudulent insurance claim for a loss due to an alleged burglary...." (Indictment, paragraph 1).

"At the time such pretenses and representations were made, defendant well knew them to be false. The scheme, so devised and intended to be devised, was implemented in substance as follows:...." (Indictment, paragraph 2) The sole claim presented to Aetna by Miller was premised upon the "alleged burglary", claimed by the government to be a non-existent burglary of trucks and goods.

At the indicting grand jury, the government presented the testimony of one Fisher, an employee and alleged accomplice of defendant's, who told the

grand jury that the "burglary" was non-existent. Fisher testified that he and Miller removed goods and two trucks from Miller's business premises and hid them, Miller then claiming a "burglary" of the goods and trucks and submitting a claim to Aetna for their value. Fisher's grand jury testimony and an interview statement of Fisher with the F.B.I. were furnished to defendant's counsel prior to trial and Fisher was named as a witness for trial. As defendant's trial progressed, Fisher did not respond to the government's request for his appearance. The government sought and obtained a material witness warrant for him. (18 USC §3149). He was found, arrested and brought to court. Counsel was appointed, the government obtained judicial immunity for him and then decided not to call him as a witness. Thus, no evidence whatsoever was presented to support the

contention that "a fraudulent insurance claim for a loss due to an alleged burglary" occurred. Only evidence relating to an inflated value for the goods taken was presented. At trial, defendant's counsel continually attacked the premise that the burglary was false. A motion for acquittal was made on the ground that the scheme to defraud is the element of the mail fraud and that what had not been proven left the case without evidence of the unitary sole scheme pleaded. However, the government persuaded the district court that just an inflated claim met the requisite scheme and the motion was denied. On appeal the Ninth Circuit disagreed, holding,

S.Ct. 781, 787, 30 L.Ed. 849 (1887)); *United States v. Pazsint*, 703 F.2d 420, 423 (9th Cir. 1983).

The reasoning underlying *Mastelotto* controls this case. The grand jury may well have declined to indict Miller simply on the basis of his exaggeration of the amount of his claimed loss. *See Mastelotto, supra, slip op.* at 1250. In fact, it is quite possible

that the grand jury would have been unwilling or unable to return an indictment based solely on Miller's exaggeration of the amount of his claimed loss even though it had concluded that an indictment could be returned based on the overall scheme involving a use of the mail caused by Miller's knowing consent to the burglary. *Id.* (citing *Stirone, supra*, 361 U.S. at 217, 80 S.Ct. at 273). Accordingly, Miller's conviction cannot stand because he was convicted of offenses not only for which he was not indicted but also for which we cannot say that he would have been indicted.

"A contrary result is not required by our cases holding that the government need not prove every fraudulent act or statement alleged in the indictment as demonstrating the fraudulent nature of the scheme charged. *See United States v. Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979); *United States v. Outpost Development Co.*, 552 F.2d 868, 869-70 (9th Cir. 1977), *cert. denied*, 434 U.S. 965 (1977). The existence of a scheme to defraud is an element of the crime of mail fraud. *Beecroft*, 608 F.2d at 757. The government must prove false statements or fraudulent acts in order to show the defendant's specific intent to defraud. *Id.* These cases simply hold that the government's proof of fraudulent intent may be sufficient even if it does not prove every fraudulent act alleged in the indictment. Nothing in them conflicts with the principle that the jury must find the existence of substantially the same fraudulent scheme as that charged by the grand jury. Because, as noted above, there can be no dispute that Miller's conviction was predicated on a substantially different scheme from that pleaded in the indictment, the conviction cannot stand."

(Petition, pp. 7a-7b)

The Court of Appeals knew the facts set forth, supra, regarding witness Fisher, because the facts were represented in the appellant's opening brief, at oral argument and not contested by appellee. (There is no trial transcript in the record; neither party ordered one). The Court of Appeals, on the facts available to it, viewed the case as one indicted on the testimony of witness Fisher as to the illegal conduct and scheme.

1. Petitioner incorrectly states that respondent "does not take issue" with the jury's conclusion that the government proved beyond a reasonable doubt a violation of the mail fraud statute (Petition, p. 7). It is precisely the failure to prove the essential factor of the unitary scheme pleaded that resulted in the reversal by the Court of Appeals and was the premise

of the appellant on appeal.

2. This case is an inappropriate vehicle for review by certiorari or for presenting the parade of horrors imagined by the government. The decision of the Court of Appeals reversed the conviction, without direction for further proceedings, thus leaving unresolved issues pertaining to retrial, double jeopardy considerations or the extent of prejudice suffered at the trial by virtue of the surprise resting of the govenment's case without calling Fisher as a witness.1/ Thus the "expansive principle" of the case imagined by the

---

1/ This was not a case where a prosecutor determined that he did not need the witness or that one witness would do in place of another. The prosecutor had only one witness to support the linchpin of the scheme's false burglary and he tried diligently, albeit unsuccessfully, to obtain the testimony.

government, is in fact purely speculative. Nor is it correct to assume, as petitioner does, that the Miller court was forced to it's decision by Mastelotto and this certiorari is needed to correct the two cases. The Solicitor General declined to seek certiorari in Mastelotto, which he now characterizes as the architect of the future troubles prognosticated in the government's petition. The Court of Appeals here did not find Mastelotto controlling; it said "The reasoning underlying Mastelotto controls...".

3. The government construes the Court of Appeals opinion to deviate from a uniform line of authority allowing withdrawing a portion of an indictment from a jury or allowing relatively distinct plans for fleecing intended victims. (Petition, p. 8). On the record before it, from the briefs and from oral

argument, the Court of Appeals understood that "...making a fraudulent insurance claim for a loss due to an alleged burglary..." (Indictment, paragraph 1, emphasis added) involved one scheme with a plan. The proof of loss sworn to by Miller and mailed (Count 1) was a false claim that a burglary had taken place. The value of the goods and trucks "stolen" was, a fortiorari, fraudulent from $1.00 to any amount.

Miller was convicted only upon (1) the mailing of the sworn proof of loss, which involved the false burglary and (2) upon receipt of $50,000.00. The $50,000.00 is not defined in the record as being attributable to the "grossly inflated" claim (Indictment, paragraph 7).

4. The case below represents a prosecution properly pleaded but in which the key witness did not testify. When the

accomplice changes his story, fails to appear or deceases, and the case - as here - is predicated for indictment and trial solely upon his testimony, the result often is dismissal. The government suggests that this case is one where the "...government failed to present evidence addressed to one secondary allegation - consent to the burglary - ...." (Petition, p. 17). The Court of Appeals was not presented with any such fact and understood differently: from the Indictment briefs and oral argument it was given to understand that Fisher testified at the grand jury to the fictitious burglary. Because of the paucity of facts in the government's brief and in the record, there is nothing presented to the Court of Appeals indicating that any evidence of gross inflation of property, other then by virtue of it not being stolen at all, was

part of the scheme presented for grand jury consideration. At trial the defense sought to establish, through cross-examination and by its own witnesses, that a real burglary had occurred, in order to confront the expected alleged accomplice's testimony. The Court of Appeals, aware that the Indictment was apparently predicated upon the grand jury's hearing from Fisher, properly concluded that without Fisher, the "scheme" was no scheme.

It would be difficult, if not impossible, for this court to conclude, from the record available, anything different from the Court of Appeals' view of what was presented to the grand jury and against which defendant defended.

If it is appropriate to educate the Courts of Appeal that reversal is improper when a trial proves a narrower charge than that indicted, it should

await a case where the grand jury's indictment can be shown to be based on something additional to the sole testimony of accomplice Fisher.

The government below did not seek to clarify the record and seeks a grant of certiorari on the premise that the Court of Appeals has either departed from established precedent or is confused by Ex Parte Bain (Petition, p. 13). This case presents a poor vehicle from which to so conclude.

5. In a somewhat unusual contention Petitioner notes the dismissal of an "exceptionally important" (whatever that means) fraud prosecution in the Northern District of California, implying that unless this court straighens out the thinking of at least five judges of the Court of Appeals and one district judge, chaos will result. (Petition, pp. 17-18, citing U.S. v. Dorfman). The

government will not lack for an opportunity to persuade the Court of Appeals that the decision in Dorfman is erroneous, for it has been appealed by the United States as to two of the three defendants - Schwartz and Chapman - thus permitting a review of the district court's analysis on its facts and a full record. [The government conceded, as to the third defendant, Frank Marolda, that the district court is correct and did not appeal the order acquitting Marolda. In spite of the name appended to the case by Petitioner, there is no prosecution against a "Dorfman"; he deceased before arraignment.]

6. Mastelotto held that the jury ought to be instructed so that one could conclude that the jurors convicted upon proof of a particular scheme - not six for one scheme and six for another. Miller held that if one single scheme

was charged, the failure to prove it requires reversal, also impliedly validating the premise that the sudden resting of the prosecutor's case without calling Fisher surprised defendant and thus affected his substantial rights. He defended against a non-existent burglary and then is faced with combatting a different allegation. The government switched its position at the close of the case and said, "sure, the burglary occurred and the goods and trucks were taken, but you have overstated by some amount the value of the goods (apparently not the trucks) and that is the crime. The Court of Appeals applied the Stirone and Kaiser rules (U.S. v. Kaiser, 660 F.2d 724, 730 (9th Cir. 1980), finding, on the facts available to it, a constructive amendment affecting Miller's substantial rights.

CONCLUSION

Certiorari should be denied.

DATED: June 11, 1984

JERROLD M. LADAR

JERROLD M. LADAR
Attorney for
JAMES RUAL MILLER

REPLY

BRIEF

No. 83-1750

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1750

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

In our petition we argued that the court of appeals erred in holding that the Fifth Amendment right to be tried only on indictment by a grand jury requires that a mail fraud conviction be set aside when the fraudulent scheme proved by the government at trial is somewhat narrower than the scheme alleged in the indictment. For the most part respondent does not take issue with our legal arguments; instead, he urges that, for various reasons, the Court should not review this particular case. Respondent's contentions do not withstand scrutiny.

1. We noted in our petition (at 7) that there is no question that the government proved beyond a reasonable doubt that respondent violated the mail fraud statute and that respondent has not taken issue with that proposition. Respondent now asserts (Br. in Opp. 6) that we misrepresented his position. However, he proceeds simply to claim

that the government failed to prove the "essential" component of the scheme that was alleged in the indictment (*id.* at 6-7). Again, he stops short of contending that the government failed to prove violations of the mail fraud statute.

The claim respondent does make — that the government failed to prove some essential part of what was alleged in the indictment — is in fact quite absurd. Indeed, it cannot even be said that there was a variance in this case. The government proved at trial precisely the same criminal acts that were alleged in the indictment. The crimes charged were (1) mailing of a certain false "proof of loss" and (2) causing the mailing of a check for $50,000 that represented partial payment of the false claim. The government proved at trial that respondent had mailed that "proof of loss," that it was false (because respondent had inflated the amount of copper he had on hand at the time of the burglary), and that he had caused the mailing of the $50,000 check. Those were the "essential" elements of the crimes charged.

Respondent characterizes the allegation of a false burglary as "essential." But whether or not there was a false burglary had nothing to do with the government's ability to prove the mailings and the falsity of the proof of loss. Of course, the detailed description in the indictment of how respondent allegedly implemented his fraud (which included both false burglary and inflation of the amount of copper on hand) may have provided useful background. However, it did not form a necessary part of the offenses alleged and proved — filing a false proof of loss and causing a check to be mailed on the basis of that false proof of loss.

2. In a related claim, respondent portrays this case as one in which the government unexpectedly changed its theory from fraud by means of an insurance claim based on a false burglary to fraud based on an insurance claim reflecting inflation of the amount of copper respondent had on hand

at the time of the burglary (Br. in Opp. 9-11, 14). The indictment on its face disproves this characterization. The indictment charges, inter alia, that it was part of the scheme that respondent "would and did claim to have lost 210,170 pounds of copper wire, worth $123,500" and that he "well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company" (Pet. App. 4a).[1] The government's proof at trial established the truth of these allegations. See *id.* at 2a-3a. Thus, contrary to respondent's assertion (Br. in Opp. 8-9), this case is indistinguishable from those cited in our petition (at 8-11), in which courts have held that the

---

[1]Respondent focuses on the indictment's description of the mail fraud scheme as "making a fraudulent insurance claim for a loss due to an alleged burglary" (Pet. App. 4a) and asserts that the description refers solely to false burglary (Br. in Opp. 3-4, 9). Respondent's characterization is simply incorrect. There is no question that the government proved the sort of fraudulent scheme it alleged when it established that respondent inflated the amount of copper wire taken in a burglary when he filed his insurance claim. The reference to "alleged burglary" does not limit the scheme to one involving a false burglary. Whether or not the burglary took place, it is surely appropriate to refer to it in the indictment as an "alleged burglary."

Respondent implies (Br. in Opp. 7, 14) that he was astonished to learn during trial that the government would not present evidence of a false burglary. Respondent expressed no such surprise at the close of the government's evidence; instead, he merely moved (unsuccessfully) for a judgment of acquittal on the ground "that the testimony adduced is of such questionable character in respect to its probative value that there is insufficient evidence" (Reporter's Partial Tr. 3). Respondent did not at any time seek a continuance on the ground that he needed additional time to collect evidence relating to the charge that respondent had inflated the amount of copper wire. If respondent's counsel in fact focused his preparation only on the allegation of false burglary, he took a calculated risk that the government might choose to concentrate on other features of the alleged scheme.

government need not prove all allegations about a fraudulent scheme, so long as the evidence presented at trial is sufficient to establish each element of the crime alleged.

Respondent also suggests (Br. in Opp. 10-12) that a court must look behind an indictment to see whether the evidence the government presented to the grand jury differs significantly from evidence it presented at trial. In particular, respondent implies that Fisher, his employee, was the only witness the government presented to the grand jury and that the government's failure to offer Fisher's testimony at trial indicates that it must have completely changed its theory of the case.[2] Respondent cites no evidence to support his allegation that Fisher's testimony was the sole evidence heard by the grand jury.[3] But, more importantly, in urging that the Court should wait for a case in which the record is better developed on this point, respondent fails to recognize that a court's inquiry into whether there has been a prejudicial variance is based on a comparison of the evidence presented at trial with the charges that appear in the indictment itself. See, *e.g.*, *Kotteakos* v. *United States*, 328 U.S. 750 (1946); *Berger* v. *United States*, 295 U.S. 78 (1935). It is simply

---

[2]Respondent's assertions (Br. in Opp. 7 n.1) that "[t]his was not a case where a prosecutor determined that he did not need the witness or that one witness would do in place of another" and that the prosecutor tried "unsuccessfully" to obtain Fisher's testimony are without foundation. Respondent's own account of the proceedings (*id.* at 3) indicates correctly that the government could have called Fisher as a witness but "decided not to." Of course, the prosecutor's determination — that, in view of existing law concerning proof of mail fraud, he did not need Fisher's testimony — was proved correct when the jury rendered its verdict.

[3]In fact, the bulk of the evidence before the grand jury (including evidence about respondent's inflation of the amount of copper wire he had on hand) consisted of the testimony of the FBI agent who was responsible for investigation of the case. Respondent did not receive a copy of the transcript of the agent's grand jury testimony because the agent was not a witness at trial.

inappropriate for a court to go behind the face of the indictment and to attempt to determine whether there is a sufficiently close match between the evidence presented to the grand jury and that presented to the petit jury. Cf. *United States* v. *Calandra*, 414 U.S. 338 (1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956).

3. Respondent notes (Br. in Opp. 7) that the courts below made no finding concerning the extent to which he was prejudiced by the government's failure to prove part of what it alleged in the indictment, implying that the Court should wait for a case in which there is such a finding. But the court of appeals' failure to address the government's argument that respondent had not shown any prejudice must reflect the court's view that lack of prejudice is irrelevant in cases like this one.

Respondent also points out (Br. in Opp. 7) that the court of appeals failed to address the question whether a retrial in this case would be barred by principles of double jeopardy. Of course, the court's failure to confront the effect of its holding increases the likelihood that the decision below will create mischief and unnecessary confusion. Respondent does not suggest that retrial would be possible in this and similar cases; indeed, it is predictable that he would seek dismissal on double jeopardy grounds if the government sought to reindict him. Respondent contends merely that the government should await developments in other Ninth Circuit cases in which courts reverse convictions or dismiss indictments on the basis of the decision below before it seeks a resolution of the difficulties created by the decision. In our view, the approach respondent urges would entail too high a price in terms of harm to law enforcement.[4]

---

[4]Respondent suggests (Br. in Opp. 12-13), inter alia, that the government should bide its time until the court of appeals decides the appeal in *United States* v. *Dorfman*, a case in which a district court dismissed an

For the foregoing reasons and those presented in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JUNE 1984

---

important fraud prosecution on which the government had expended significant amounts of time and resources, on the basis of the decision below and *United States* v. *Mastelotto*, 717 F.2d 1238 (9th Cir. 1983). See Pet. 17-19. At the same time, petitioner appears to take the government to task for failing to seek certiorari in *Mastelotto*, the case in which the court of appeals set out the reasoning it applied in this case. See Br. in Opp. 8. Of course, the government's normal practice is not to seek review by this Court of the first adverse decision in a particular area. As in this case, the government often waits to see whether a holding will cause more widespread problems. Moreover, in *Mastelotto* there were alternative holdings; indeed, in *Mastelotto* the discussion of the question at issue here appeared to be secondary to the question of jury unanimity. Thus, the statements in *Mastelotto* are properly characterized as dictum, while in this case they were transformed into a holding.

DOJ-1984-06

JOINT

APPENDIX

No. 83-1750

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

JERROLD M. LADAR
507 Polk Street
Suite 310
San Francisco, CA. 94102
(415) 928-2333
Counsel for Respondent

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR WRIT OF CERTIORARI
FILED APRIL 27, 1984
CERTIORARI GRANTED, OCTOBER 1, 1984

TABLE OF CONTENTS*

*The opinion of the court of appeals is printed in the appendix to the petition for writ of certiorari and has not been reproduced.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CR 82-0369-RFP

Chronological List of Relevant Docket Entries
United States of America *v.* James Rual Miller

DATE	PROCEEDING
June 30, 1982	Indictment
July 1, 1982	Arraignment
August 17, 1982	Trial begins; Count 3 dismissed on government's motion
August 20, 1982	Jury returns verdict of guilty on Counts 1 and 2
September 30, 1982	Motion for judgment of acquittal filed
November 10, 1982	Motion for judgment of acquittal denied; defendant sentenced
November 11, 1982	Notice of appeal filed

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 82-0368

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES RUAL MILLER, DEFENDANT

VIOLATION: TITLE 18, UNITED STATES CODE, SECTION 1341—MAIL FRAUD

INDICTMENT

COUNT ONE: (18 U.S.C. 2, 1341)

The Grand Jury charges: THAT

1. Beginning on or about July 2, 1981 and continuing to on or about October 26, 1981, in the City and County of San Francisco, in the State and Northern District of California,

JAMES RUAL MILLER

defendant herein, being the President of San Francisco Scrap Metal Inc., did devise and intend to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations from Aetna Insurance Company by making a fraudulent insurance claim for a loss due to an alleged burglary at San Francisco Scrap Metal.

2. At the time such pretenses and representations were made, defendant well knew them to be false. The scheme, so devised and intended to be devised, was implemented in substance as follows:

3. It was a part of the scheme that on or about July 2, 1981, defendant would and did increase his insurance policy coverage from $50,000 to $150,000 to be in effect for a two week period ending July 15, 1981.

4. It was a further part of the scheme that on or about July 15, 1981, defendant would and did report that a burglary had occurred at San Francisco Scrap Metal during the evening of July 14, 1981.

5. It was a further part of the scheme that defendant would and did claim to have lost 210,170 pounds of copper wire, worth $123,500 and two trucks during the alleged burglary.

6. It was a further part of the scheme that defendant well knew that the alleged burglary was committed with his knowledge and consent for the purpose of obtaining the insurance proceeds.

7. It was a further part of the scheme that defendant well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company.

8. It was a further part of the scheme, that on or about August 10, 1981, for the purpose of executing the scheme to defraud, in the City and County of San Francisco, in the State and Northern District of California,

JAMES RUAL MILLER

defendant herein, did knowingly and wilfully cause to be placed in an authorized depository for mail matter of the United States Postal Service, an envelope containing a "proof of Loss" addressed to Daouglas & Malmgren Adjusters, Emeryville, California.

COUNT TWO: (18 U.S.C. 2, 1341)

The Grand Jury further charges: THAT

1. All of the charges contained in paragraphs 1-7, inclusive, of Count One of the Indictment are hereby realleged by the Grand Jury.

2. It was a further part of the scheme that on or about August 18, 1981, for the purpose of executing the scheme to defraud, in the City and County of San Francisco, in the State and Northern District of California,

JAMES RUAL MILLER

defendant herein, did knowingly and wilfully cause to be placed in an authorized depository for mail matter of the

United States Postal Service an envelope containing a check for $50,000 from Aetna Insurance Company.

COUNT THREE: (18 U.S.C. 2, 1341)

1. All of the charges contained in paragraphs 1-7, inclusive, of Count One of the Indictment are hereby realleged by the Grand Jury.

2. It was a further part of the scheme that on or about October 9, 1981, for the purpose of executing the scheme to defraud, in the City and County of San Francisco, in the State and Northern District of California,

JAMES RUAL MILLER

defendant herein, did knowingly and wilfully cause to be placed in an authorized depository for mail matter of the United States Postal Service an envelope containing a check for $50,000 from Aetna Insurance Company.

DATED

A TRUE BILL.

/s/ _____
Foreman

JOSEPH P. RUSSONIELLO
United States Attorney

PETER ROBINSON

EXCERPTS FROM TRIAL TRANSCRIPT
(from Reporter's Partial Transcript):

[3] AUGUST 18, 1982

* * * * *

MR. LADAR: My understanding is that Mr. Robinson is resting, which means we come to a motions portion. I would be prepared then, after that is heard and decided, although one always lives in optimism—I am going to have my witnesses ready to proceed.

THE COURT: Do you wish to make your motion at this time?

MR. LADAR: Yes. We would move for a judgment of acquittal pursuant to rule 29 on the basis, your honor, that there has not been presented sufficient credible evidence to demonstrate that a scheme and artifice to defraud, as set forth in the indictment, has been proven by sufficient evidence to go to the jury. I base that on the fact that the testimony adduced is of such questionable character in respect to its probative value that there is insufficient evidence.

THE COURT: Motion will be denied.

MR. LADAR: We will be prepared to proceed, then. My first witness tomorrow will be Mr. Douglas, who will appear here.

* * * * *

AUGUST 20, 1982

* * * * *

THE COURT: Do you want to speak further about your rule 29 motion?

[4] MR. LADAR: Very briefly. I believe that I stated yesterday, but I'll repeat for the record, your honor, that the motion under rule 29 incorporates the grounds made at the close of the government's case, as well as the additional ground now, at the close of all of the evidence, that what the government has done is to have proven, if it can prove at all, evidence which would support a grossly inflated insurance claim based upon the amount set forth to the insurance company, but we believe that the government alleged

in its indictment a carefully drawn one, approved by the assistant and his superiors, which alleged a scheme and artifice, the integral part of which was a consented to burglary by Mr. Miller and, therefore, a claim which was totally spurious, as well as inflated, to meet the policy limits that had been set by the increase in insurance; and that the court, faced with a situation at the close of the case, should hold that the only basis upon which the government may proceed is to have adequate proof of a burglary connected with this particular insurance claim.

The government's proof having wholly failed in that respect to the burglary, we believe there is insufficient evidence to present the unitary, single scheme and artifice alleged by the government to the jury, and the motion under rule 29 should be granted. It is that, and a fatal variance, that we believe underlies our motion.

THE COURT. All right. The ruling will be reserved.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. CR 82 0368 RFP
MOTION FOR ACQUITTAL
[F.R. Crim. P. 29]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JAMES RUAL MILLER, DEFENDANT

TO: THE UNITED STATES OF AMERICA, PLAINTIFF HEREIN, JOSEPH RUSSONIELLO, UNITED STATES ATTORNEY and PETER ROBINSON, ASSISTANT UNITED STATES ATTORNEY, COUNSEL FOR PLAINTIFF, please take notice that on the fourteenth (14th) day of October, 1982, at 10:00 a.m., before the Honorable Robert F. Peckham, Chief United States District Judge, Federal Court House, 450 Golden Gate Avenue, San Francisco, California, defendant James Rual Miller by and through counsel, will move the court for an order granting the previously made motion for acquittal upon which the court has reserved ruling on the ground that the government failed to prove certain essential elements of the offense alleged in the indictment, to wit:

Count 1: 1. Allegation 3, p.2, lines 2-4;
2. Allegation 6, p.2, lines 13-16;

Count 2: The same (The allegations of Count 1 were incorporated by reference in Count 2).

The motion is supported by the memorandum of Points and Authorities filed herewith and by such other documentary material as may be filed or oral material presented upon hearing.

/s/ _____
JERROLD M. LADAR, ESQ.
Counsel for Defendant
James Raul Miller

DATED: SEPTEMBER 30, 1982

Final two paragraphs of unmodified court of appeals opinion, as issued September 13, 1983:

> A contrary result is not required by *United States* v. *Outpost Development Co.*, 552 F.2d 868 (9th Cir. 1977), cert. denied, 434 U.S. 965, 98 S.Ct. 503, 54 L.Ed.2d 450 (1977), and *United States* v. *Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979), which the government cites as holding that proof of one fraudulent statement suffices to sustain a mail fraud conviction. As this court noted in *Mastelotto*, the issue on appeal in both *Outpost* and *Beecroft* was "whether the evidence that was adduced was sufficient for the jury to find that the scheme charged was fraudulent." *Mastelotto*, *supra*, slip op. at 2312 n.11, at ____ n.11. This court further stated in *Mastelotto* that "neither [*Outpost* nor *Beecroft*] gainsays that the jury must, in any event, find the existence of a fraudulent scheme substantially as broad as that charged by the grand jury, even if it does conclude that not every particular alleged misrepresentation was in fact fraudulent." *Id.* Because, as noted above, there can be no dispute that Miller's conviction was predicated on a substantially narrower scheme than that pleaded in the indictment, the conviction cannot stand.
>
> For the foregoing reasons, the judgment of conviction is vacated.

Supreme Court of the United States

No. 83-1750

UNITED STATES, PETITIONER

v.

JAMES RUAL MILLER

ORDERING ALLOWING CERTIORARI. Filed *October 1, 1984*.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

PETITIONER'S

BRIEF

No. 83-1750

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Fifth Amendment right to be held to answer only on indictment by a grand jury requires that a court set aside a mail fraud conviction when the fraudulent scheme proved by the government at trial is narrower than the scheme alleged in the indictment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued

Cases—Continued

Cases—Continued

Constitution, statutes and rule:

Constitution, statutes and rule—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 83-1750

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 715 F.2d 1360. A modification to that opinion (Pet. App. 9a-10a) is reported at 728 F.2d 1269.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1983. A petition for rehearing was denied on March 21, 1984 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on April 27, 1984, and was granted on October 1, 1984 (J.A. 9). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, respondent was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to concurrent terms of two years' imprisonment on each count.

1. The evidence at trial showed that respondent was the owner of San Francisco Scrap Metals, Inc., a company that regularly purchased scrap wire and stripped, baled, and resold it.[1] On July 2, 1981, respondent increased the insurance coverage for his business from $50,000 to $150,000 for the two-week period ending July 15, 1981. On the morning of July 15, 1981, respondent reported that his business had been burglarized the previous evening. He informed police that two trucks and 201,000 pounds of copper wire had been stolen. Respondent subsequently mailed to Aetna Insurance Company a proof of loss that represented, inter alia, that he had lost 201,000 pounds of copper wire as a result of the burglary. Respondent received $100,000 from Aetna in compensation for the loss, $50,000 of which was sent to him through the mail. Pet. App. 2a-3a.

The evidence indicated that respondent had inflated the amount of copper he reported to Aetna as stolen. Respondent's account of the source of the allegedly stolen copper did not coincide with the facts. On July 20 respondent reported to the insurance adjuster that the missing copper had been purchased from L.K. Comstock, Inc., and from Kingston Electric. Kingston Electric in fact had sold a quantity of copper to respondent's company, but the latter had resold a similar quantity of copper to Battery Salvage Company prior to the burglary. Respondent contended that the copper sold to Battery

[1] Counsel for the parties agreed at the court of appeals stage to stipulate to the facts in lieu of ordering a transcript. The description of the evidence in the text is taken from the court of appeals' opinion and from the statement of facts in the government's brief in the court of appeals.

Salvage had been purchased from Brayer Electric. However, neither Brayer Electric nor L.K. Comstock had sold respondent's company the copper he claimed to have purchased from them. Pet. App. 3a. Several of respondent's employees who were working on the day of the alleged burglary testified that there was "no way" respondent had anything close to 201,000 pounds of copper on hand at that time.

2. The indictment charged respondent with three counts of mail fraud, in violation of 18 U.S.C. 1341. Count one was based on respondent's placement of the proof of loss in the mail, and count two was based on his causing the mailing of the $50,000 check from Aetna. Count three, which was based on the other $50,000 check, was dismissed on the government's motion before trial.

The scheme alleged in each count of the indictment was described in paragraphs one through seven of count one. Those paragraphs alleged, inter alia, that it was a part of the scheme that respondent knew of the burglary and consented to it for the purpose of obtaining the insurance proceeds and that it was also a part of the scheme that he grossly inflated the amount of copper allegedly taken during the burglary.[2]

[2] Paragraphs one through seven of count one of the indictment (which were realleged in count two) read as follows (J.A. 2-3):

> 1. Beginning on or about July 2, 1981 and continuing to on or about October 26, 1981, in the City and County of San Francisco, in the State and Northern District of California,
>
> JAMES RUAL MILLER,
>
> defendant herein, being the president of San Francisco Scrap Metal Inc., did devise and intend to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations from Aetna Insurance Company by making a fraudulent insurance claim for a loss due to an alleged burglary at San Francisco Scrap Metal.
>
> 2. At the time such pretenses and representations were made, defendant well knew them to be false. The scheme, so

At trial, the government presented evidence that the alleged mailings had taken place and that respondent had grossly inflated the amount of copper taken when he submitted the proof of loss to Aetna. The government did not, however, produce evidence proving that respondent knew in advance about the burglary and consented to it. At the close of the government's evidence, the prosecutor moved to strike the "false burglary" allegation from the indictment. Respondent opposed the motion on the ground that the "false burglary" was part of the scheme alleged in the indictment. The court denied the government's motion to strike.

Respondent then moved for a judgment of acquittal on the ground that the government had failed to prove that there was any scheme and artifice to defraud. The court denied that motion. See J.A. 5. Respondent renewed his motion at the close of all the evidence, contending that, since the government had failed to prove consent to the burglary, there was insufficient evidence to support the

---

devised and intended to be devised, was implemented in substance as follows:

3. It was a part of the scheme that on or about July 2, 1981, defendant would and did increase his insurance policy coverage from $50,000 to $150,000 to be in effect for a two week period ending July 15, 1981.

4. It was a further part of the scheme that on or about July 15, 1981, defendant would and did report that a burglary had occurred at San Francisco Scrap Metal during the evening of July 14, 1981.

5. It was a further part of the scheme that defendant would and did claim to have lost 210,170 pounds of copper wire, worth $123,500 and two trucks during the alleged burglary.

6. It was a further part of the scheme that defendant well knew that the alleged burglary was committed with his knowledge and consent for the purpose of obtaining the insurance proceeds.

7. It was a further part of the scheme that defendant well knew that the amount of copper claimed to have been taken during the alleged burglary was grosaly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company.

"unitary, single scheme and artifice alleged;" according to respondent, this gap in proof amounted to a "fatal variance." *Id.* at 6. The court reserved a ruling on the motion (*ibid.*). The court instructed the jury that the government was required to prove only one or more of the acts charged in the indictment in order to show the existence of the scheme. The jury rendered a guilty verdict on both counts.

Following trial, respondent renewed his motion for acquittal, contending that the government had failed to prove "certain essential elements of the offense alleged in the indictment," *i.e.*, the allegations in paragraphs three and six of count one, relating to false burglary (J.A. 7). The court denied the motion (*id.* at 1).

3. The court of appeals vacated respondent's convictions (Pet. App. 1a-8a). Citing a standard it had articulated in *United States* v. *Mastelotto*, 717 F.2d 1238 (9th Cir. 1983), the court concluded that respondent's convictions could not stand because the petit jury convicted him on the basis of a scheme to defraud Aetna by inflating the amount of the claimed loss, while the grand jury had indicted on the basis of a scheme consisting of both the inflated claim and respondent's knowing consent to the burglary. The court opined that "[t]he grand jury may well have declined to indict [respondent] simply on the basis of his exaggeration of the amount of his claimed loss" (Pet. App. 7a). The court initially characterized respondent's convictions as "predicated on a substantially narrower scheme than that pleaded in the indictment" (J.A. 8; 715 F.2d at 1363). On rehearing, the court modified its opinion to characterize respondent's convictions as "predicated on a substantially different scheme from that pleaded in the indictment" (Pet. App. 8a, 10a).

SUMMARY OF ARGUMENT

A. The court of appeals erred in holding that respondent's convictions could not stand because the government's proof at trial failed to address one feature—advance knowledge of, and consent to, the burglary—of the scheme described in the indictment. This Court long ago held that the government's failure to prove at trial every feature of a fraudulent scheme alleged in the indictment does not violate the Fifth Amendment right to be held to answer only on indictment by a grand jury. *Salinger* v. *United States*, 272 U.S. 542, 548-549 (1926). Consistent with this holding, every court of appeals has concluded that narrowing of charges to fit the proof at trial does not constitute a violation of a defendant's right to be tried for the crime for which he was indicted, so long as the remaining allegations state an offense. Fed. R. Crim. P. 7(c)(1), which provides for allegation in a single count that an offense was committed "by one or more specified means," implicitly recognizes the validity of those holdings.

This well-established principle conforms to the realities of the criminal process. As a practical matter, it is not uncommon that the prosecution will be unable to prove each and every allegation contained in an indictment, even though it is able to prove all the elements necessary to conviction of the offense charged. In general, indictments are drafted broadly in order to leave room for contingencies of proof. However, the prosecutor may be unable for various reasons to introduce at trial all the evidence that was before the grand jury, which may have heard hearsay or considered illegally seized evidence, for example. In addition, although the grand jury may have found probable cause to believe certain allegations to be true, the prosecutor may be unable to satisfy the more exacting trial standard of proof of those allegations beyond a reasonable doubt. Finally, narrowing of charges cannot prejudice a defendant,

since the proof at trial is by definition wholly encompassed within the allegations of the indictment.

Here the indictment charged that respondent engaged in a fraudulent scheme that had two features—a knowing burglary and inflation of the amount of copper on hand at the time of the burglary. At trial, the government proved the latter feature, but not the former. Under *Salinger* and cases that have followed it, and in conformity with the policies underlying Fed. R. Crim. P. 7(c)(1), this narrowing of the charges did not violate respondent's right to be indicted by a grand jury.

B. The court of appeals erred in relying on *Ex parte Bain*, 121 U.S. 1 (1887), a decision that has been limited to its facts. *Stirone* v. *United States*, 361 U.S. 212 (1960), also cited by the court of appeals, has no proper application because it involved a broadening, rather than a narrowing, of the charges in an indictment.

C. In any event, we believe *Bain* is no longer good law and should be overruled expressly. The Court held in *Bain* that amendment of an indictment was improper because it was impossible to know whether the grand jury would have indicted on the basis of the narrower charges proved at trial. But the purposes of an indictment are to screen against unwarranted prosecutions and to provide notice to a defendant of the charges against him. Once the indictment is handed down, the grand jury's role ends. And once a conviction has been obtained, concerns about the grand jury's screening function should likewise be at an end. *Bain* in effect reverses the established roles of the grand jury and the petit jury by holding that the latter's finding beyond a reasonable doubt that the defendant committed the offense named in the indictment may be overturned by indulging in speculation about whether the grand jury would have declined to find probable cause on the basis of the same evidence considered by the petit jury.

Bain has led to considerable confusion in the lower courts, which have had to expend much energy attempt-

ing to reconcile *Bain* with later, fundamentally inconsistent decisions of this Court. *Bain* has led courts to apply very different standards to amendments (or "constructive amendments"), on the one hand, and variances, on the other, despite the substantial conceptual overlap between, and the congruity of interests protected by, the two doctrines.

The Fifth Amendment right to be indicted by a grand jury shields a defendant from being convicted of a crime with which he was never charged. We do not deny that this is a significant right. But we submit that the interests served by that right are fully satisfied if it can be said that a defendant has been tried for the offense named in the indictment and that he has not suffered substantial prejudice as a result of any deviations between allegations contained in the indictment and the proof presented at trial. The proof at trial must establish the elements of the offense charged and must relate to the same general complex of facts described in the indictment. Beyond that basic requirement, any deviation from the allegations of the indictment (whether it be characterized as an amendment or as a variance) should lead to reversal of a conviction only if it can be shown that the defendant suffered substantial prejudice as a result of that deviation.

Here, the prosecution proved the elements of the mail fraud offense with which respondent was charged, and the proof at trial related to the series of events described in the indictment, *i.e.*, respondent's efforts to obtain from the insurance company money to which he was not entitled in connection with the alleged burglary. Respondent could not have suffered any prejudice from the government's failure to present proof addressed to one feature of the charged fraudulent scheme. The court of appeals therefore should have affirmed respondent's convictions.

ARGUMENT

THE FIFTH AMENDMENT RIGHT TO INDICTMENT BY A GRAND JURY DOES NOT SUPPORT REVERSAL OF A CONVICTION ON THE GROUND THAT THE FRAUDULENT SCHEME PROVED BY THE GOVERNMENT AT TRIAL WAS NARROWER THAN THE DESCRIPTION OF THE SCHEME CONTAINED IN THE INDICTMENT

This case concerns the extent to which the Fifth Amendment requires correspondence between the allegations contained in an indictment and the proof presented at trial. Respondent was indicted on three counts of mail fraud and was convicted by a jury on two of those counts. There is no dispute that the evidence offered by the government at trial showed beyond a reasonable doubt that respondent in fact violated the mail fraud statute. The prosecution demonstrated that respondent engaged in a fraudulent scheme to obtain money not due him by submitting an inflated insurance claim for the value of copper allegedly stolen from his business and that the mails were used in furtherance of that scheme. The proof presented at trial unquestionably fell within the scope of the description of the scheme contained in the indictment, which included the allegation that respondent submitted an inflated insurance claim.

The court of appeals nevertheless held that respondent's convictions could not stand because the government's proof at trial failed to address one other feature of the scheme described in the indictment—advance knowledge of, and consent to, the burglary. The court based that holding on its reading of the Fifth Amendment right to be held to answer only on indictment by a grand jury. In concluding that respondent's convictions must be vacated, the court reasoned that "[t]he grand jury may well have declined to indict [respondent] on the basis of his exaggeration of the amount of his claimed

loss," citing *United States* v. *Mastelotto*, 717 F.2d 1238, 1250 (9th Cir. 1983) (Pet. App. 7a). The court also invoked *Mastelotto* for the proposition that "the petit jury must find that the defendant participated in the overall scheme alleged by the grand jury because the court could not be certain that the grand jury would have indicted on the basis that the defendant participated in only part of the scheme" (Pet. App. 6a).

The court of appeals also relied (Pet. App. 6a) on the statement in *Mastelotto* (717 F.2d at 1248-1249) that a defendant's Fifth Amendment right to be tried for a crime for which he has previously been indicted by a grand jury compels the conclusion that "[a] defendant cannot be convicted of a count charging participation in a fraudulent scheme Y where the grand jury indicted based on his participation in a fraudulent scheme X, *even if the schemes themselves overlap or are concentric*" (emphasis added). In apparent reliance on the *Mastelotto* court's reference to "concentric" schemes, the court in this case held that respondent's convictions must be vacated because the government's proof of respondent's fraudulent scheme, though falling entirely within the bounds of the description in the indictment, was in one respect *narrower* than that description.

In so holding, the court of appeals departed from decisions of this Court and of every court of appeals that hold that the evidence at trial need not match the allegations in the indictment when, as here, the effect of any disparity is to narrow the charges against a defendant. *Ex parte Bain*, 121 U.S. 1 (1887), a decision on which the court of appeals relied heavily in both this case and *Mastelotto*, does not require the result reached below. But even if *Bain* were not distinguishable, we believe it is no longer good law. The reasoning in *Bain* reflects a misconception of the purpose of the Fifth Amendment and the role of the grand jury in the criminal process. *Bain* has generated persistent confusion in the lower courts. In our view, it would be appropriate for the

Court to take this opportunity expressly to overrule *Bain*.

A. Applicable Precedent Establishes That The Government's Proof At Trial Need Not Match The Allegations In The Indictment When The Effect Of Any Disparity Is Merely To Narrow The Charges Against A Defendant

In holding that respondent's convictions must be vacated because the government did not produce evidence at trial of every feature of the fraudulent scheme described in the indictment, the court of appeals disregarded a uniform line of authority from this Court and every court of appeals. Those decisions make clear that the proof the government presents at trial need not match the allegations in the indictment when, as here, the effect of any disparity is to narrow the charges against the defendant. Such a narrowing of the charges does not in any way interfere with the defendant's Fifth Amendment right to be held to answer only on indictment by a grand jury. As Professor Wright has explained, "a portion of an indictment that the evidence does not support may be withdrawn from the jury, and this is not an impermissible amendment, provided nothing is thereby added to the indictment, and the remaining allegations charge an offense." 1 C. Wright, *Federal Practice and Procedure* § 127, at 422 (2d ed. 1982).

1. Decisions of this Court provide the foundation for the "ameliorating doctrine" described by Professor Wright (*ibid.*). In *Salinger* v. *United States*, 272 U.S. 542 (1926), the Court held that narrowing of the charges at trial in that mail fraud case did not in any way violate the defendant's Fifth Amendment rights. The indictment in *Salinger* charged a scheme to defraud that was "manifold in that it comprehended several relatively distinct plans for fleecing intended victims" (272 U.S. at 548). The trial court withdrew from the jury all of the plans except one, on the ground that they were with-

out support in the evidence. This Court rejected the defendant's challenge to the withdrawal of part of the charge; it held that failure of the evidence to support all but one of the plans "did not work an amendment of the indictment and was not even remotely an infraction of the constitutional provision that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury" (*id.* at 549).[3] *Salinger* is controlling here.[4]

---

[3] In support of this conclusion, the Court cited *Goto* v. *Lane*, 265 U.S. 393 (1924), and *State* v. *Evans*, 40 La. App. 216 (1888). In *Goto*, the Court held that a stipulation by defendants that the indictment should be understood as using the word "and," rather than the word "or," in several places did not render defendants' convictions void. In *Evans*, the court held that the prosecutor's abandonment of the portion of the indictment for murder that charged the defendant with lying in wait did not constitute an impermissible amendment of the indictment.

The Court in *Salinger* also cited *Crain* v. *United States*, 162 U.S. 625, 636 (1896), and *Hall* v. *United States*, 168 U.S. 632, 638-639 (1898). *Crain* rejected a challenge to a count of an indictment that charged that the defendant engaged in several distinct acts. The Court stated, "[w]e perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute" (162 U.S. at 636). *Hall* rejected the defendant's claim that the government was required to prove that he had violated both sections of a statute as was alleged in the indictment. The Court noted that "[t]he result of such a holding would be to say that where an indictment contained all the necessary averments to constitute an offence created by the statute, if an averment wholly unnecessary and entirely immaterial be added, the prosecution must fail unless it prove such unnecessary averment, although proving every fact constituting the offence provided by the statute" (168 U.S. at 639).

[4] Although the government cited *Salinger* in its petition for rehearing in this case (at 4-5, 12), the court of appeals made no reference to that decision in its order denying rehearing. In *United States* v. *Mastelotto*, 717 F.2d at 1251 n.13, the court distinguished *Salinger* on several grounds, all of which are without merit. The *Mastelotto* court stated first that *Salinger* stands merely for the proposition that "'a count cannot be stricken in part as distinguished from a dismissal of the whole count,'" quoting *Edgerton* v. *United States*, 143 F.2d 697, 699 (9th Cir. 1944). In fact, the record in *Salinger* shows, contrary to the *Edgerton* court's assumption, that parts of each count, rather than entire counts, were withdrawn from the jury in *Salinger*. As in this case, the indictment in *Salinger* described in the first count of the indictment the scheme and the means by which it allegedly was carried out; each subsequent count referred to a separate mailing and simply referred back to the description of the scheme in the first count. See *Salinger* v. *United States*, No. 238 (1926 Term), Tr. of Record at 2-41, 442-453.

The court in *Mastelotto* next suggested that *Salinger* was distinguishable on the ground that Salinger himself requested at trial that the unproved plans be withdrawn from the jury (see 272 U.S. at 548). However, there is no indication that the Court in *Salinger* relied on any theory of waiver in concluding that the trial court's action did not violate the Fifth Amendment. Indeed, the *Salinger* Court's citation to *Evans*, *Crain*, and *Hall* makes clear that Salinger's consent was irrelevant to its holding.

Finally, the *Mastelotto* court distinguished *Salinger* on the ground that Salinger had not raised, and the Court had not considered, the possibility that he was prejudiced because the petit jury might have convicted him for a crime for which the grand jury would not have indicted him. That basis for distinction is contradicted by the record. In his brief Salinger stated expressly: "Who may say there would have been any indictment returned if the evidence before the grand jury had been addressed to nothing but the single element which the [district court] retained." *Salinger* v. *United States*, No. 238 (1926 Term), Brief and Argument for Plaintiff in Error at 8. Thus, the Court in *Salinger* considered precisely the same sort of claim of prejudice presented in this case and in *Mastelotto*.

Shortly after it decided *Salinger*, the Court again held that the prosecution need not prove every allegation contained in an indictment. In *Ford* v. *United States*, 273 U.S. 593 (1927), the indictment charged a conspiracy to smuggle liquor in violation of several federal statutes and in violation of a treaty; in fact, the treaty did not create any offense against the law of the United States. The Court observed that "that part of the indictment

[referring to violation of the treaty] is merely surplusage and may be rejected" (*id.* at 602). The Court rejected the defendants' claim that the trial court's willingness to disregard the allegation that the conspiracy would violate the treaty amounted to an impermissible amendment of the indictment; in the Court's view, the trial court's action constituted "merely a judicial holding that a useless averment is innocuous and may be ignored" (*ibid.*).

A similar issue arose in a somewhat different context in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In that Sherman Act case, the defendants alleged, inter alia, a "fatal variance" (*id.* at 248) between the agreement charged in the indictment and the agreement proved at trial. They asserted that the government had failed to prove the allegation that they had falsified price quotations published in trade journals, which they characterized as "an integral and essential part of the plan as charged" (*id.* at 249). Defendants took the position that the discrepancy between the allegations and the proof at trial violated their Sixth Amendment right to notice of the charges against them. The Court rejected defendants' claim, noting that use of trade journals was only one of several alleged means by which the objectives of the conspiracy were to be accomplished. The Court stated (310 U.S. at 250): "A variation between the means charged and the means utilized is not fatal. And where an indictment charges various means by which the conspiracy is effectuated, not all of them need be proved."

The Court reiterated in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), that the prosecution need not prove at trial every allegation contained in the description of a conspiracy in an indictment. The Court held in *Kotteakos* that, in the circumstances of that case, the defendants' rights had been substantially prejudiced when both the indictment and the jury instructions charged a single conspiracy, but the evidence at trial showed eight

or more separate conspiracies. The Court was careful to observe, however, that there was leeway for cases in which "proof may not accord with exact specifications in indictments" (*id.* at 773). The Court explained (*id.* at 773-774 n.29):

> It is common approved practice, in charging a conspiracy, to name all who may be reached with process and whom it is anticipated the proof will connect with the scheme, although in most instances whether it will so turn out for each defendant can be only problematical. If failure to substantiate the charge as to one or more were to change the identity of the crime charged, so as to require reindictment and retrial for the others, the law of conspiracy would be a dead letter.

The Court made a similar point in *Turner* v. *United States*, 396 U.S. 398, 419-421 (1970). There the Court indicated that a reviewing court must uphold a conviction if the evidence is sufficient to prove one, but not all, of several alternative means of committing an offense that are charged in the indictment.[8] The Court consid-

[8] Most courts of appeals have agreed that a conviction on a count charging several illegal acts, or several objectives of a conspiracy, should not be reversed on the ground that there is insufficient evidence with respect to some of the acts or objectives charged; rather, the verdict must be upheld so long as there is sufficient evidence to support one or more of the other acts or objectives charged. See, *e.g.*, *United States* v. *Johnson*, 713 F.2d 633, 645-646 & n.15 (11th Cir. 1983), cert. denied, No. 83-5843 (Mar. 5, 1984); *United States* v. *Mowad*, 641 F.2d 1067, 1073-1074 (2d Cir.), cert. denied, 454 U.S. 817 (1981); *United States* v. *Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981); *United States* v. *Murray*, 621 F.2d 1163, 1171 & n.10 (1st Cir.), cert. denied, 449 U.S. 837 (1980); *United States* v. *Wedelstedt*, 589 F.2d 339, 341-342 (8th Cir. 1978), cert. denied, 442 U.S. 916 (1979); *United States* v. *Mackey*, 571 F.2d 376, 387 n.14 (7th Cir. 1978); *United States* v. *Lee*, 422 F.2d 1049, 1052 (5th Cir. 1970). Contra, *United States* v. *Tarnopol*, 561 F.2d 466, 475 (3d Cir. 1977). These decisions reflect the implicit recognition that the Fifth Amendment right to indictment by a grand jury is not violated when the prosecution fails to prove all the acts, means, or objectives alleged in the indictment.

ered a count of an indictment alleging that Turner knowingly purchased, dispensed, and distributed heroin not in or from the original stamped package. The evidence at trial was sufficient to establish that Turner knowingly distributed heroin, but not necessarily that he purchased or dispensed it. The Court upheld Turner's conviction, noting (*id.* at 420) that "[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." [6]

The courts of appeals have followed the lead of these Supreme Court decisions. Every court of appeals has concluded that narrowing of charges to fit the proof at trial does not violate a defendant's right to be tried for the crime for which he was indicted, so long as the remaining allegations state an offense.[7] The courts of appeals also have agreed on the more specific proposition that the government need not prove all of the means or

[6] See also, *e.g.*, *Crain* v. *United States*, 162 U.S. at 634-636; *United States* v. *Abascal*, 564 F.2d 821, 832 (9th Cir. 1977), cert. denied, 435 U.S. 942, 953 (1978); *United States* v. *Cioffi*, 487 F.2d 492, 499 (2d Cir. 1973), cert. denied, 416 U.S. 995 (1974); 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 54.18 (3d ed. 1977).

[7] See, *e.g.*, *New England Enterprises, Inc.* v. *United States*, 400 F.2d 58, 62-65 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969); *United States* v. *Heimann*, 705 F.2d 662, 669 (2d Cir. 1983); *United States* v. *Milestone*, 626 F.2d 264 (3d Cir.), cert. denied, 449 U.S. 920 (1980); *United States* v. *Coward*, 669 F.2d 180, 183-184 (4th Cir.), cert. denied, 456 U.S. 946 (1982); *United States* v. *Salinas*, 654 F.2d 319, 325 (5th Cir. 1981); *Gambill* v. *United States*, 276 F.2d 180, 181 (6th Cir. 1960); *United States* v. *Spector*, 326 F.2d 345, 347-348 (7th Cir. 1963); *Mellor* v. *United States*, 160 F.2d 757 (8th Cir.), cert. denied, 331 U.S. 848 (1947); *United States* v. *Dawson*, 516 F.2d 796, 801-802 & n.4 (9th Cir.), cert. denied, 423 U.S. 855 (1975); *United States* v. *Whitman*, 665 F.2d 313, 316-318 (10th Cir. 1981); *United States* v. *Diaz*, 690 F.2d 1352, 1356 (11th Cir. 1982); *United States* v. *Conlon*, 661 F.2d 235, 238-239 (D.C. Cir. 1981), cert. denied, 454 U.S. 1149 (1982).

objects alleged in connection with a scheme to defraud or a conspiracy.[8]

The Federal Rules of Criminal Procedure support the view that the government should be able to narrow charges at trial. Fed. R. Crim. P. 7(c)(1) states that "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he commited it by one or more specified means." That provision was "intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways." Fed. R. Crim. P. 7(c)(1) advisory com-

[8] See, *e.g.*, *United States* v. *Gatewood*, 733 F.2d 1390, 1394 (10th Cir. 1984) ("every element of a [mail fraud] scheme need not be proved"); *United States* v. *Lemire*, 720 F.2d 1327, 1345 (D.C. Cir. 1983), cert. denied, No. 83-1413 (June 4, 1984) (proof of one object of the two-pronged wire fraud scheme alleged was sufficient); *United States* v. *Solomon*, 686 F.2d 863, 875 (11th Cir. 1982) ("When the indictment alleges a criminal conspiracy to violate several [statutes], it is sufficient to prove that the defendant conspired to accomplish only one of these offenses."); *United States* v. *Toney*, 598 F.2d 1349, 1355-1356 (5th Cir. 1979), cert. denied, 444 U.S. 1033 (1980) ("In mail fraud cases the government need * * * only prove a sufficient number of fraudulent activities to support a jury inference that there was a fraudulent scheme."); *United States* v. *AMREP Corp.*, 560 F.2d 539, 546 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) ("A scheme to defraud may consist of numerous elements, no particular one of which need be proved if there is sufficient overall proof that the scheme exists."); *United States* v. *West*, 549 F.2d 545, 552 (8th Cir.), cert. denied, 430 U.S. 956 (1977) (it is "settled doctrine" that the government need not prove all the elements of an alleged fraudulent scheme); *United States* v. *Joyce*, 499 F.2d 9, 22 (7th Cir.), cert. denied, 419 U.S. 1031 (1974) ("it is well established that every allegation of an indictment charging a scheme need not be proved in order to convict"). See also, *e.g.*, Seventh Circuit Judicial Conference, *Manual on Jury Instructions in Federal Criminal Cases* § 16.02, reprinted in 36 F.R.D. 601 (1965) ("Nor is it necessary that the Government prove all of the pretenses, representations and acts charged in the [mail fraud] indictment. It is essential only that one or more of them be proved to show the existence of the scheme.").

mittee note. See also *Sanabria* v. *United States*, 437 U.S. 54, 66 n.20 (1978) ("A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged."). It would be quite inconsistent to encourage the inclusion in a single count of alternative means by which an offense may have been committed and at the same time to penalize the government by reversing a conviction whenever it fails to prove each and every one of the means alleged. Indeed, it is difficult to imagine that the drafters of Rule 7 ever would have contemplated that a failure of proof with respect to one of several means alleged in a count could lead to reversal of a conviction.

2. The principle that the Fifth Amendment does not preclude the narrowing of charges at trial is entirely consistent with the realities of the criminal process. As a practical matter, it is not uncommon that the government will be unable to prove at trial each and every allegation contained in the indictment. See, *e.g.*, *United States* v. *Heimann*, 705 F.2d 662, 666 (2d Cir. 1983) ("proof at trial need not, indeed cannot, be a precise replica of the charges contained in an indictment"); *United States* v. *Lemire*, 720 F.2d 1327, 1344 (D.C. Cir. 1983), cert. denied, No. 83-1413 (June 4, 1984). Indictments normally are drafted broadly in order to encompass all of the proof the government hopes to present at the time of trial. It is particularly likely in complex fraud or conspiracy cases that indictments will include a wide range of allegations. Indeed, it is common practice to draft indictments conjunctively, *e.g.*, to allege that the scheme in which a defendant was involved had objects A *and* B *and* C, even when it is uncertain whether it will be possible to prove all three objects under the higher standard of proof at trial. See *United States* v. *Jordan*, 626 F.2d 928, 930 (D.C. Cir. 1980) ("it is not an infrequent practice in mail fraud cases to allege the full scheme to allow for contingencies of proof"). And see,

e.g., *United States* v. *West*, 549 F.2d 545, 547 n.1 (8th Cir.), cert. denied, 430 U.S. 956 (1977) (noting that the first ten-and-one-half pages of the indictment in that case detailed the acts of defendants that comprised the scheme and artifice to defraud).*

In many cases, for a variety of reasons, less than all of the anticipated evidence is eventually introduced by the government at trial. A grand jury witness may change his story at or prior to trial or decide at the last minute not to cooperate further with the government. Witnesses may die or disappear between indictment and trial, or the prosecutor may decide that a grand jury witness would not be effective at trial. Even apart from such developments, the prosecutor may simply conclude that the available proof is not sufficiently convincing to establish some aspect of the charged scheme or that the attempt to prove that aspect would be unduly time-consuming, confusing, or distracting from the proof of the main core of the offense. Rules of pleading and proof that impel the prosecutor nevertheless to pursue

---

* Schemes to defraud are frequently "multi-faceted." *United States* v. *Zeidman*, 540 F.2d 314, 318 (7th Cir. 1976). See, *e.g.*, *United States* v. *Robinson*, 716 F.2d 1095, 1096 (6th Cir. 1983), petition for cert pending, No. 83-613 (filed Oct. 12, 1983), and cert. denied, No. 83-5612 (Jan. 9, 1984) (insurance fraud based on inflated claims and defendants' complicity in suspicious fires that destroyed the insured property); *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980) (mail fraud scheme involving bribery, false representations, and concealment). Indeed, the fraudulent scheme alleged in this case was relatively simple compared to most.

A common type of fraudulent scheme involves the marketing of a product or service through boiler room sales techniques. Such schemes may involve multiple victims and a variety of misrepresentations about the resources and track record of the company, the nature of the product or service, the qualifications of the sales force, the nature of the contract, and the risk to the consumer. See, *e.g.*, *United States* v. *Ranney*, 719 F.2d 1183, 1185 (1st Cir. 1983); *United States* v. *Beecroft*, 608 F.2d 753, 755-756 (9th Cir. 1979); *United States* v. *Toney*, 598 F.2d at 1256.

such alternative theories of guilt to avoid a result like that in this case are hardly in the interests of fair administration of criminal justice, nor are they in the interests of defendants as a class.

The different evidentiary standards applicable at the grand jury stage and the trial stage make it all the more likely that the allegations of an indictment frequently will encompass more than the government is in the end able to prove at trial. The grand jury's role as an investigative body allows it to consider a wide range of evidence, much of which may not be admissible at a subsequent trial. Thus, the grand jury is free to consider hearsay testimony, *e.g.*, from informants or from government agents who summarize the results of their investigations for the grand jury. See *Costello* v. *United States*, 350 U.S. 359 (1956). It may hear incompetent or irrelevant evidence. See *Blair* v. *United States*, 250 U.S. 273, 282 (1919). The grand jury may even consider evidence procured in an allegedly unconstitutional manner. See *United States* v. *Calandra*, 414 U.S. 338 (1974); *United States* v. *Blue*, 384 U.S. 251, 255 (1966).[10] All of this evidence may well be ruled inadmissible at trial. Nevertheless, the grand jury is free to include in the indictment allegations based on such evidence if it

[10] See also, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 13, 15-16 (1973); *United States* v. *Reed*, 726 F.2d 570, 578-579 (9th Cir. 1984) ("The grand jury could properly inquire about [the putative defendant's] criminal record and was not bound by procedural or evidentiary rules."). Accord, *United States* v. *Wilson*, 732 F.2d 404, 409-410 (5th Cir. 1984) (grand jury "may consider any evidence bearing upon the defendant's guilt, regardless of whether that evidence would be excluded at trial"); *United States* v. *Levine*, 700 F.2d 1176, 1178-1179 (8th Cir. 1983) (grand jury could consider putative defendant's prior convictions, his refusal to speak to law enforcement officers, and erroneous statements by witnesses); *United States* v. *Echols*, 542 F.2d 948, 951-952 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977); *United States* v. *Doe*, 541 F.2d 490, 493 (5th Cir. 1976); *United States* v. *Camporeale*, 515 F.2d 184, 189 (2d Cir. 1975).

concludes there is probable cause to believe those allegations. If the prosecutor is unable subsequently to locate admissible evidence that substitutes fully for the evidence before the grand jury, some allegations of the indictment may be left unproved at the end of trial. Thus, there will not be a perfect match between the indictment and the proof at trial, even though the latter is entirely sufficient to prove beyond a reasonable doubt that the defendant committed the offense charged.

The likelihood of such a result is also increased by the different standards of proof that govern the determinations of the grand jury and the petit jury. The grand jury brings charges on the basis of a probable cause determination, while the petit jury must find beyond a reasonable doubt that the defendant committed the offense charged. For that reason alone, it is probable that there will be some discrepancy between what is alleged in the indictment and what the government can prove at trial.

At the same time, it is most unlikely that narrowing of charges at trial would ever result in any prejudice to a defendant.[11] In such cases (as in this one), everything that is proved at trial was encompassed within the allegations of the indictment. A defendant therefore receives advance warning of everything the government may attempt to prove at trial and is in a position to

[11] There might conceivably be rare cases in which the broad scheme charged in the indictment and the narrower scheme proved at trial would differ so greatly in emphasis that a defendant could claim that his ability to prepare a defense was somehow impaired. In cases in which a defendant raises and supports such a claim, it normally should be a sufficient remedy to grant a continuance to allow the defendant to investigate further the areas on which the government eventually focused its proof. In most cases, however, it seems fair to expect that a defendant is on notice that he must be prepared to address any portion of the indictment that might form the basis for a conviction.

prepare his defense on that basis. The prosecution's failure to introduce evidence sufficient to prove some of the allegations contained in the indictment can only benefit a defendant by freeing him from the need to respond to those allegations.

In fact, it is the court of appeals' holding that would cause real prejudice to defendants. That holding indicates that narrowing of charges at trial may well result in loss of convictions (as in this case). Prosecutors presumably will react by introducing evidence in support of every allegation in an indictment, even though they may believe that the evidence will prove legally or factually insufficient to sustain a conviction on a particular theory. Such a course will protect any conviction even if the prosecutor was correct in his assessment of partial insufficiency. See cases cited at page 15 note 5, *supra*. Alternatively, prosecutors may elect to confine descriptions in indictments to minimal allegations, *i.e.*, those they believe with some certainty that they will be able to prove beyond a reasonable doubt at trial. The result would be "barebones" indictments that would provide the least possible notice to defendants of the nature of the charges against them but that would apparently limit or eliminate the risk of a fatal variation between indictment and proof. Cf. *Stirone* v. *United States*, 361 U.S. 212, 218 (1960). Finally, prosecutors may attempt to avoid the consequences of the decision below by drafting indictments so that various features of a scheme would be alleged in separate counts (*e.g.*, fraud based on a scheme involving inflation of the value of copper under one count, and fraud based on a different scheme involving consent to burglary under another). That sort of cumbersome and multiplicitous pleading surely would be an undesirable practice.

In view of these practical considerations, it is most unlikely that the framers of the Fifth Amendment would

have meant to foreclose the possibility that charges in an indictment could be narrowed at trial; and it would be most undesirable to adopt such a view. The rule stated by this Court in *Salinger* is unquestionably sound.

3. This case clearly fits within the principle that narrowing of charges at trial does not constitute a violation of the Fifth Amendment. The indictment in this case alleged both that it was a part of the fraudulent scheme that respondent had advance knowledge of the burglary he reported on July 15, 1981, and consented to it for the purpose of obtaining the insurance proceeds, and also that it was a part of the scheme that he grossly inflated the amount of copper allegedly taken during the burglary. See pages 3-4 note 2, *supra*. Each was simply a means of obtaining from the insurance company money to which respondent was not entitled—the real essence of the offense. At trial the government proved that respondent had grossly inflated the amount and value of copper allegedly taken during the burglary, but not that he had advance knowledge of, and consented to, the burglary. Thus, what was proved at trial fell entirely within the description of the scheme in the indictment, although it was narrower in one respect than the whole of what was alleged.

In an apparent effort to distinguish this case from *Salinger* and cases that have followed it, the court of appeals described the scheme the government proved at trial here as "substantially different" from the scheme pleaded in the indictment (Pet. App. 8a). But the only "difference" was in the scope of the scheme. The scheme proved at trial was merely a subset of that described in the indictment; it was the very same scheme, minus one feature (knowledge of, and consent to, the burglary).[12]

---

[12] There is evidence that the court of appeals itself found the description in the indictment and the proof at trial to be "different" only in the sense that the latter was narrower than the former. In the opinion it originally issued, the panel described respondent's con-

The court of appeals' characterization of the proof at trial as establishing a scheme "substantially different" from that described in the indictment cannot change the fact that this case involves only a narrowing of the charges. Of course, the "substantially different" characterization could be attached to many cases in which the scope of the proof at trial is narrower than the scope of the description in the indictment. In *Salinger* itself the Court could have concluded that the government's failure to prove all but one of the alleged plans for defrauding the victims of the mail fraud rendered the scheme proved at trial "substantially different" from that alleged in the indictment. Certainly it was at least as "different" as in the present case.[13] But there is no indication that such a characterization would have changed the result in *Salinger* or in any of the other cases in which this Court and others have concluded that narrowing of charges at trial does not violate the Fifth

---

viction as predicated on a "substantially narrower scheme than that pleaded in the indictment" (J.A. 8; 715 F.2d at 1363). After the government filed a petition for rehearing calling attention to the court's failure to consider cases that appeared to permit narrowing of charges, the panel modified its opinion to substitute the phrase "substantially different scheme from that pleaded in the indictment" (Pet. App. 8a). See *id.* at 10a.

In reprinting the court of appeals' opinion in the appendix to the petition, we erroneously reproduced the modified version of the penultimate paragraph of the opinion, rather than the original version issued on September 13, 1983. Compare Pet. App. 8a with *id.* at 10a. We have reprinted the original version of the penultimate paragraph of the opinion in the joint appendix (see J.A. 8). That original version also appears at 715 F.2d at 1363.

[13] Indeed, the trial court in *Salinger* withdrew from the jury for lack of evidence 11 of the 12 means by which it was charged that Salinger had conducted a fraudulent scheme. *Salinger* v. *United States*, No. 238 (1926 Term), Tr. of Record at 442-453; Brief and Argument for Plaintiff in Error at 2. Here the government's proof was inadequate with respect to only one of the two means alleged.

Amendment. Because the proof at trial in this case merely narrowed the scope of the scheme charged, it is clear that there was no violation of respondent's Fifth Amendment right to be held to answer only on indictment by a grand jury.[14]

---

[14] If, contrary to our submission, the court of appeals were correct in concluding that the government's proof of a scheme narrower than that alleged in the indictment constituted reversible error, we assume it would be open to the government to obtain a new indictment based on the narrower scheme and to try respondent under the more limited indictment. Compare, *e.g.*, *United States* v. *Cambindo Valencia*, 609 F.2d 603, 606, 628 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980) (remanding for retrial or new indictments when evidence showed multiple conspiracies, rather than the single conspiracy alleged in the indictment); *United States* v. *Bertolotti*, 529 F.2d 149, 158-159 (2d Cir. 1975) (same); *United States* v. *Varelli*, 407 F.2d 735, 747-748 (7th Cir. 1969) (same). But cf. *United States* v. *Camiel*, 689 F.2d 31, 40 (3d Cir. 1982); *United States* v. *Eaton*, 501 F.2d 77, 80 (5th Cir. 1974); *Gov't of the Virgin Islands* v. *Aquino*, 378 F.2d 540, 554 (3d Cir. 1967). It would be clearly inappropriate to allow a defendant to escape prosecution entirely because of the government's failure to achieve a perfect match between the allegations of the indictment and proof presented at trial, when the proof at trial establishes beyond a reasonable doubt that the defendant committed the offense with which he was charged.

The "error" in such a case would be more properly described as a defect in the indictment than as a failure of proof; in this case, for example, no error could have been identified if the indictment had been drafted so that it alleged an inflated claim, but not a knowing burglary. Double jeopardy principles therefore would not bar a retrial on a new indictment. See, *e.g.*, *Lee* v. *United States*, 432 U.S. 23 (1977). By no stretch of the imagination could the court of appeals' reasoning in this case be described as amounting to an acquittal within the meaning of *United States* v. *Scott*, 437 U.S. 82, 96-98 (1978). Of course, to the extent the court's conclusion that the government proved a "substantially different" scheme from that alleged in the indictment (Pet. App. 8a, 10a) indicates that it viewed the evidence as proving an offense different from that charged, there clearly would be no double jeopardy concern. The Double Jeopardy Clause bars retrial only "for the same offence."

B. The Court Of Appeals Was Not Bound To Reverse Respondent's Convictions On The Basis Of This Court's Decisions In *Ex parte Bain* And *Stirone* v. *United States*

We have shown in the foregoing discussion that the result reached by the court of appeals is wholly contrary to sound policy and practice, as well as to much seemingly well settled authority. We now address whether other authority nevertheless compels the result reached below. The Ninth Circuit in this case and in *United States* v. *Mastelotto*, 717 F.2d at 1248-1251, based its analysis in large part on *Ex parte Bain*, 121 U.S. 1 (1887), and on passages from *Stirone* v. *United States*, *supra*, that rely heavily on *Bain*. However, this case can be distinguished on its facts from *Bain* and even more clearly from *Stirone*.

In *Bain* the cashier and directors of a national banking association were charged with violating Rev. Stat. § 5209, which, inter alia, prohibited directors and cashiers of any banking association from making "any false entry in any book, report, or statement of the association, with intent * * * to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association * * *." 121 U.S. at 3. The indictment alleged that the defendants had made false statements in a report submitted to the Comptroller of the Currency "with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of said association * * *" (*id.* at 4). The defendants demurred to the indictment, and the demurrer was sustained (*id.* at 5). Then, in response to the government's motion, the trial court struck from the indictment as surplusage the words "the Comptroller of the Currency and" (*id.* at 5, 9). The trial court severed the trial of Bain (the cashier) from that of the other

defendants, and Bain was tried and convicted on the indictment as modified.

This Court reversed Bain's conviction on the ground that removal of the reference to the Comptroller of the Currency constituted an impermissible amendment of the grand jury's indictment, in violation of the Fifth Amendment. The Court noted that no authority had been cited to it that sustained "the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute" (121 U.S. at 8). The Court rejected the trial court's determination that the grand jury would have handed down the indictment without the reference to the Comptroller. It stated (*id.* at 9-10):

> [A defendant] can only be tried upon the indictment as found by [the] grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the [trial] court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom [Bain] intended to deceive by a report which was made upon his requisition and returned directly to him.

The Court went on to suggest that "[i]f it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury * * * may be frittered away until its value is almost destroyed" (*id.* at 10).

This Court subsequently confined *Bain* to its facts. In *Salinger* v. *United States*, the Court noted that in *Bain* "there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. The principle on which the decision proceeded is not broader than the situation to which it was applied." 272 U.S. at 549. Recently this Court reaffirmed that *Bain* "was long ago limited to its facts by *Salinger* v. *United States*." *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 2 n.2.

The Court in *Ford* (273 U.S. at 602) and *Salinger* (272 U.S. at 549) distinguished *Bain* on the ground that it involved an actual physical alteration of the indictment.[15] In addition, the *Salinger* Court distinguished *Bain* on the ground that the amendment in that case was thought necessary to cure a defective indictment (*i.e.*, to "avoid an adverse ruling on demurrer"). See *United States* v. *Milestone*, 626 F.2d 264, 267 (3d Cir.), cert. denied, 449 U.S. 920 (1980) (interpreting *Bain* to apply only to cases in which the unamended indictment does not charge a crime).[16] In this case, there was no

[15] In our view, the fact that there has been an actual physical alteration of the indictment is not a sensible basis for distinguishing *Bain*. As we explain below (pages 39-40, 46-47), we believe the standard for whether the proof at trial has deviated impermissibly from the allegations of the indictment should not differ depending on whether there has been a physical modification of the indictment.

[16] We also question this ground for distinguishing *Bain*. It is unclear why the indictment in *Bain* would have been subject to dismissal. The Third Circuit in *Milestone* suggested that the reference to the Comptroller of the Currency might have rendered the indictment defective because the statute referred only to intent to deceive the examining agents, not the Comptroller. See 626 F.2d at 267. However, the words relating to the Comptroller in the *Bain* indictment presumably could have been treated as surplusage and ignored, since the indictment also charged intent to deceive an examining agent and therefore stated an offense. That is how this precise problem was handled in *Ford*. See 273 U.S. at 602.

physical alteration of the indictment. In addition, the indictment clearly charged the crime of mail fraud and would not have been subject to dismissal for failure to state an offense. Thus, while we doubt that the distinctions between *Bain* and this case afford a logical basis for a difference in results (see notes 15-16, *supra*), the limitations this Court has heretofore imposed on the authority of *Bain* mean that it cannot properly be invoked to justify reversal of respondent's convictions.

In *Mastelotto* and in this case, the court of appeals also cited *Stirone* v. *United States*, a decision of this Court involving a conviction under the Hobbs Act. In *Stirone*, the Court quoted at length from *Bain* (see 361 U.S. at 215-218) in support of its conclusion that the discrepancy between the allegations of the indictment, on the one hand, and the jury charge and proof at the trial of Stirone, on the other, amounted to an impermissible "constructive amendment" of the indictment. But *Stirone* is clearly distinguishable from this case. There the indictment alleged that Stirone, by extortion, had obstructed interstate shipments of sand to a site in Pennsylvania, where the sand was to be used to manufacture concrete that in turn was to be used in construction of a steel-processing plant in Pennsylvania. Over Stirone's objection, the trial court permitted the government to introduce evidence not only that Stirone had obstructed Pennsylvania-bound shipments of sand, but also that his actions led to interference with shipments of steel from Pennsylvania to other states. The trial court instructed the jury that it could convict on the basis of Stirone's interference with *either* interstate movement of sand into Pennsylvania (as charged in the indictment) or interstate movement of steel out of Pennsylvania (not mentioned in the indictment). 361 U.S. at 213-214.

In reversing Stirone's conviction, the Court noted that "[e]ver since *Ex parte Bain* * * * was decided in 1887

it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself" (361 U.S. at 215-216). The Court concluded that interference with commerce is an essential element of a Hobbs Act offense and cannot be regarded as surplusage (*id.* at 218). According to the Court, in *Stirone* as in *Bain*, "we cannot know whether the grand jury would have included in the indictment a charge that commerce in steel from a nonexistent steel mill had been interfered with" (361 U.S. at 219). The Court concluded that, in view of the trial proof and jury instructions, the jury could have convicted Stirone for interference with interstate commerce in steel, a charge the grand jury never made against him (*id.* at 218-219).

Stirone stands for the proposition that the charges of an indictment may not be *broadened* significantly by the proof at trial and instructions to the jury when those changes involve an essential element of the crime.[17] But, as we explained above, this case concerns *narrowing* of the charges in the indictment, not broadening. Moreover, the discrepancy between the indictment and the proof at trial in this case cannot be said to go to an essential element of the mail fraud offense; rather, it involves only the description of one feature of the alleged scheme to defraud. *Stirone* therefore does not support the court of appeals' reversal of respondent's convictions.

---

[17] We note, however, that proof of a kind of interstate commerce different from that alleged in the indictment in *Stirone* did not mean that the defendant was convicted of a different offense from that charged in the indictment. Surely, for instance, he could not have been separately tried and twice punished for a single extortionate act that affected two different aspects of interstate commerce. Thus, while the result in *Stirone* might conceivably have been justified on the basis of prejudice resulting from unfair surprise to the defendant, we believe, for the reasons set forth in Part C of this brief, that the analysis set forth in *Stirone* is unsound.

C. The Court Should Take This Opportunity To Overrule *Ex parte Bain* Expressly

As we explained in the preceding section, the Court could reverse the judgment of the court of appeals on the ground that this case is distinguishable from *Bain* and *Stirone* and is governed instead by *Salinger*. However, we believe *Bain* is no longer good law and that the better course would be for the Court to take this opportunity expressly to overrule *Bain*. The Court's analysis in *Bain* rested on a misconception of the grand jury's role in the criminal process. The Court itself appears subsequently to have recognized the weakness of the reasoning it offered in *Bain*, and on a number of occasions it has departed from that decision's apparently rigid prohibition on any deviation from the allegations of an indictment. As a result, the lower federal courts have had to struggle to reconcile *Bain* with other, more flexible, decisions of this Court and with the dictates of common sense. Despite the fact that this Court has over a period of years removed all the underpinnings of *Bain*, the case continues to generate confusion in the lower courts.

1. The reasoning articulated by the Court in *Bain* and applied by the court of appeals in this case and in *Mastelotto* does not withstand scrutiny. The Court in *Bain* concluded that removal from the indictment of the reference to the Comptroller of the Currency violated the defendant's Fifth Amendment right to indictment by a grand jury because no court could be certain that the grand jury would have indicted if it had not considered the defendant's intent to deceive the Comptroller himself, but only his intent to deceive the examining agents. *Bain* therefore implies that, even if the prosecution succeeds in proving beyond a reasonable doubt that a defendant committed the offense charged, any deviation from allegations of an indictment will be fatal to the conviction if a court cannot know for certain that the

grand jury would have indicted on the basis of the evidence presented at trial. The Court's comments in *Bain* strongly suggest that a court could never be certain of what the grand jury would have done in such circumstances,[18] and therefore that any deviation from the terms of the indictment will violate the Fifth Amendment.

The *Bain* Court's focus on what the grand jury might have done if it had been presented with the proof subsequently offered at trial was erroneous; indeed, it suggests a significant misperception of both the purposes served by the Fifth Amendment right to be held to answer only on an indictment and the role of the grand jury under our system of criminal justice. The Fifth Amendment requirement that a criminal prosecution be preceded by an indictment by a grand jury serves as a protection against oppressive or unwarranted criminal prosecutions. *Costello* v. *United States*, 350 U.S. at 362. The grand jury serves a screening function when it determines whether there is probable cause to believe that an individual has committed an offense. An indictment

[18] The Court in *Bain* challenged the trial court's conclusion that the words stricken from the indictment were surplusage and could not have affected the grand jury's decision to indict: "But it is not for the court to say whether they would [indict] or not. * * * How can the court say that there may not have been more than one of the jurors who found this indictment, who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury?" 121 U.S. at 9-10.

If this principle were sound, we do not see how a court could affirm a conviction on a lesser included offense where the evidence on the greater offense is defective, or even affirm convictions whenever the petit jury fails to convict on all counts of the indictment. A defendant could always suggest that the grand jury might have declined to indict if it had considered only evidence relating to the lesser included offense or only evidence relating to some of the counts.

also provides notice to the defendant of the charges against him, so that he can prepare a defense. *Russell* v. *United States*, 369 U.S. 749, 763, 766 (1962).[19]

Neither of these functions is inherently threatened by the existence of some difference between the allegations of an indictment and the proof at trial, or by an actual physical alteration to the indictment. For example, there was no suggestion in *Bain* that the grand jury had not found probable cause to believe Bain had violated Rev. Stat. § 5209 by submitting certain false reports or that he was not held to answer for that same offense. Bain unquestionably had sufficient notice of the charges against him to enable him to prepare his defense, since the indictment expressly charged him with an intent to deceive agents who examined the banking association, as well as the Comptroller of the Currency.

In this case, there is likewise no doubt that the grand jury performed its screening function by finding probable cause to believe respondent had committed mail fraud in connection with particular mailings and that he was eventually tried for, and convicted of, that very offense. And respondent clearly had sufficient notice of the charges against him to permit him to prepare his defense, since everything the government proved at trial was within the scope of the description of the fraudulent scheme contained in the indictment. In such circum-

[19] An indictment also helps to ensure that a defendant will not be placed in jeopardy twice for the same offense. *Russell* v. *United States*, 369 U.S. at 764. However, this purpose does not appear to be significantly implicated by deviations between charges and the proof at trial, since courts normally refer to the entire record of a proceeding in determining whether a defendant is being placed twice in jeopardy for the same offense. See *ibid.*; *Bartell* v. *United States*, 227 U.S. 427, 433 (1913); *Dunbar* v. *United States*, 156 U.S. 185, 191 (1895). Of course, there is clearly no threat that a defendant will be placed in double jeopardy in cases like this one, in which the proof at trial falls entirely within the scope of what is alleged in the indictment.

stances, there should be no need for further inquiry into what the grand jury might have thought or done in a hypothetical situation (*i.e.*, if it were presented only with the proof the government eventually offered at trial).

The Court in *Bain* appears erroneously to have merged the roles of the grand jury and the petit jury. Under our system of criminal justice those two bodies serve different functions. The grand jury makes a preliminary determination that there is probable cause to believe the defendant has committed a crime—the necessary predicate to a criminal prosecution. The petit jury then makes the determination whether the government has proved guilt beyond a reasonable doubt, based on evidence presented at trial.

In focusing on the possibility that the grand jury might have chosen not to indict if it had considered only the narrower proof eventually introduced at trial, the Court in *Bain* seriously distorted and confused the respective functions of the grand jury and the petit jury. The grand jury performs only the initial functions of screening on the basis of the low threshold standard of probable cause and providing notice of the charges; once the indictment is handed down, the grand jury's role is complete. The petit jury then determines whether the evidence presented at trial is sufficient to establish guilt beyond a reasonable doubt. At that point, the indictment serves to ensure that the defendant is held to answer only for offenses as to which the grand jury found probable cause. But the grand jury itself plays no role in evaluation of the evidence at trial; that is the sole responsibility of the petit jury. And once the petit jury finds that the evidence presented at trial established beyond a reasonable doubt that the defendant committed the offense charged, the screening body's finding of probable cause to believe that offense had been committed becomes essentially irrelevant. At that stage the defendant has had a trial on the merits, in which he

presumably enjoyed the benefit of "strict observance of all the rules designed to bring about a fair verdict." *Costello* v. *United States*, 350 U.S. at 364. There is little point in then revisiting an earlier stage to consider whether some variation on the grand jury process would have yielded a determination that there was sufficient reason to put the defendant through the trial he has already experienced. See *ibid.*

Application of the *Bain* analysis turns the normal scheme upside down, elevating the role of the grand jury above that of the petit jury. For example, in vacating respondent's convictions, the court of appeals discounted entirely the petit jury's finding of guilt *beyond a reasonable doubt*. Instead, the court placed decisive weight on improbable speculation that the grand jury (presumably on the basis of leniency) might not have made the preliminary determination of *probable cause* if it had considered only the evidence that was presented to the petit jury—even though there was no reason to doubt that probable cause to charge respondent must in fact have been demonstrated by the evidence that was sufficient to convict him.[20]

The *Bain* Court's reliance on speculation about what the grand jury might have done if it had considered the evidence presented at trial is particularly anomalous in view of the longstanding reluctance of courts to inquire into the thought processes of the grand jury. This Court has determined that an indictment by a competent and unbiased grand jury may not be challenged on the basis

---

[20] Since the only possible injury to a defendant identified under the analysis of *Bain* and the court below in this case involves the possibility that the grand jury might in its discretion have elected not to indict had it been presented only with the narrower scheme proved at trial, it would seem to follow that the injury could be fully rectified simply by requiring the prosecution to secure a new indictment. If it is able to do so, it is hard to see what purpose is served by setting aside the otherwise valid conviction obtained in a fair and error-free trial.

of the nature or sufficiency of the evidence on which it is based. *Costello* v. *United States*, 350 U.S. at 363. Indeed, a conviction may not be set aside on the ground that the grand jury had no evidence at all to support the indictment. See *ibid.*; *United States* v. *Calandra*, 414 U.S. at 345; *Lawn* v. *United States*, 355 U.S. 339, 349-350 (1958). Against this background, it seems wholly irrational to suggest that a conviction nevertheless ought to be set aside on the basis of speculation about whether the grand jury would have indicted if it had considered only competent evidence that the petit jury found sufficient to establish guilt beyond a reasonable doubt.[21]

2. In view of the unsatisfactory nature of the reasoning employed by the Court in *Bain*, it is not surprising that that decision has generated considerable confusion among the lower courts. That confusion is rooted in part in the fact that this Court has provided conflicting signals about the proper reading of *Bain* and the extent to which it remains good law.

Bain itself appears to set out an absolute rule against any deviation from the allegations in an indictment. As we noted above (see page 32 & note 18), the Court in *Bain* seemed to suggest that a court could never be sure that a grand jury would have indicted if it had considered evidence that was in any way different from what it in fact heard prior to handing down the indictment. Thus, any deviation between the allegations in the indictment and the proof at trial presumably would require reversal of a conviction. Moreover, the Court cited with apparent approval cases in which slight drafting errors —for example, in a date or a name included in an in-

---

[21] We can scarcely believe that the court of appeals, had it focused more specifically upon the offense respondent was proved to have committed in this case, could have found it in fact plausible to suppose that the grand jury would have refused to indict for a fraudulent scheme limited to the submission of a false and grossly inflated claim of loss to the insurance company.

dictment—had led to dismissal of an indictment or reversal of a conviction. See 121 U.S. at 6-9.

In several cases decided after *Bain*, the Court appeared to indicate that *Bain* should be read far more narrowly than its sweeping language would suggest. As we explained above, the Court in *Salinger* v. *United States*—the case closest factually to the present case—purported to limit *Bain* to its facts and to permit at least narrowing of the charges when there was no physical alteration of the indictment (272 U.S. at 549). And in *Ford* v. *United States*—a case virtually indistinguishable from *Bain*—the Court appeared to indicate (273 U.S. at 602) that the prosecution's failure to prove allegations of an indictment that could be characterized as "surplusage" would not violate a defendant's Fifth Amendment rights, despite the *Bain* Court's apparent rejection of the trial court's "surplusage" reasoning in that case (see pages 26-27, *supra*). In *Berger* v. *United States*, 295 U.S. 78 (1935), the Court did not even cite *Bain* in discussing the claim that a conviction must be reversed when the indictment charged a single conspiracy but the proof at trial showed two separate conspiracies. The Court concluded in *Berger* (295 U.S. at 82) that reversal would be appropriate in such a case only when the variance in proof affected the substantial rights of the defendant. Finally, in *Russell* v. *United States* the Court described *Bain* as standing for the proposition that "an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form" (369 U.S. at 770).

These decisions seemed to suggest that, despite the broad language of *Bain*, both variances in proof and actual physical amendments to indictments might be permissible in a considerable variety of circumstances. But not long before its decision in *Russell*, the Court decided *Stirone* v. *United States* in a manner that appeared at least partially to resuscitate *Bain*. *Stirone* stated that *Bain* "has never been disapproved" (361

U.S. at 217).[22] Despite the fact that *Stirone* did not involve either an actual physical alteration of the indictment or an indictment that would have been subject to dismissal, the Court found *Bain* to be relevant. Applying the reasoning of *Bain*, the Court concluded that Stirone's conviction must be reversed because no court could be sure that the grand jury would have been willing to charge that Stirone's conduct interfered with interstate exportation of steel (*ibid*). *Stirone* thus appeared to indicate that *Bain* continued to be good law.

In view of this Court's apparently inconsistent statements, it is not surprising that the lower courts have disagreed about the vitality of *Bain* and whether and how it should be limited. Some courts have suggested that *Bain* applies only to cases involving actual physical alterations to the indictment. See, *e.g.*, *United States* v. *Heimann*, 705 F.2d at 665. Others have concluded that such a distinction is not consistent with a practical reading of *Bain* and that physical modification is permissible. See, *e.g.*, *United States* v. *Milestone*, 626 F.2d at 269; *Thomas* v. *United States*, 398 F.2d 531, 539-540 (5th Cir. 1967). Some courts have suggested that *Bain* applies only to cases in which the unamended indictment did not charge a crime. See, *e.g.*, *United States* v. *Milestone*, 626 F.2d at 267.[23] Still others have described *Bain* as limited to matters of "substance." See, *e.g.*, *United States* v. *Kegler*, 724 F.2d 190, 193-195 (D.C. Cir. 1983); *United States* v. *Cina*, 699 F.2d 853, 858 (7th Cir.), cert. denied, No. 83-28 (Nov. 28, 1983). Most courts have satisfied themselves that, in light of this Court's decisions in *Salinger* and *Ford*, *Bain* could not preclude narrowing of charges (even though *Bain* itself appeared to involve narrowing of the allegations of the indictment). See cases cited at page 16 note 7, *supra*. But, as in this case, courts occasionally conclude that the

[22] The opinion did not discuss or even mention *Salinger*.

[23] See page 28 note 16, *supra*.

reasoning of *Bain* requires reversal of a conviction in a case in which charges have merely been narrowed.

The lower courts have expended considerable energy in the nearly impossible task of attempting to define the limits of *Bain* and to distinguish it from, or reconcile it with, other decisions of this Court. In some cases courts of appeals have spent pages analyzing *Bain* and subsequent decisions of this Court and others before persuading themselves that wholly insubstantial changes in the terms of an indictment (including, *e.g.*, correction of typographical errors in dates or slight variations in names) did not warrant reversal of convictions that were clearly supported by the evidence. See, *e.g.*, *United States* v. *Cina*, 699 F.2d at 856-860; *United States* v. *Bush*, 659 F.2d 163, 165-167 (D.C. Cir. 1981); *United States* v. *Milestone*, 626 F.2d at 266-269; *Thomas* v. *United States*, 398 F.2d at 536-540. The courts of appeals themselves have acknowledged that it is not easy to reconcile *Bain* with other relevant authority. See, *e.g.*, *United States* v. *Cina*, 699 F.2d at 857-858; *United States* v. *Dawson*, 516 F.2d at 801-804; *United States* v. *Cirami*, 510 F.2d 69, 72 (2d Cir.), cert. denied, 421 U.S. 964 (1975); *Heisler* v. *United States*, 394 F.2d 692, 695-696 (9th Cir.), cert. denied, 393 U.S. 986 (1968) ("the progeny of *Bain* are out of joint").

Moreover, *Bain* and subsequent decisions of this Court and others have created an unsatisfactory dichotomy between the standards applied to "amendments" or "constructive amendments" to an indictment, on the one hand, and "variances," on the other. In general, an amendment is said to occur when the court or the prosecutor makes a physical change in the language of the indictment, as in *Bain*. A constructive amendment exists when the court submits a case to the jury on a theory different from that set out in the indictment with respect to what a reviewing court regards as an essential element of the offense, as in *Stirone*. A variance arises when the evidence offered at trial proves facts different from those

alleged in the indictment. See *Berger* v. *United States*, *supra*. Under the present state of the law, amendments generally are judged more strictly; an amendment or constructive amendment to an indictment is usually held to be cause for automatic reversal, unless a court concludes that it falls within some exception to the strict prohibition set out in *Bain*. However, a variance between the indictment and the proof at trial is cause for reversal only if it affects the defendant's substantial rights (see *Berger*, 295 U.S. at 82), *i.e.*, if it subjects him to unfair surprise or to the possibility of further prosecution for the same offense. See, *e.g.*, *United States* v. *Cina*, 699 F.2d at 858 (cases suggest that actual "amendment" of an indictment is prejudicial per se, while a "variance" between written allegations and proof is amenable to a "materiality" and "prejudice" analysis).

This dichotomy in standards makes little sense. In light of the substantial conceptual overlap between amendments and variances and the congruity of interests protected by the two doctrines, it is difficult to understand why the standards for reversal should be different, depending on whether a particular case is characterized as presenting an amendment or a variance. Indeed, if anything, amendments should be the preferred course for countenancing a disparity between the proof at trial and the specifications of the indictment, since an amendment at least gives the defendant advance notice of the disparity. See *United States* v. *Cina*, 699 F.2d at 858. To the extent *Bain* appears to compel more stringent scrutiny of amendments to an indictment, it discourages prosecutors from advising defendants at an early stage that the government's proof will not match precisely the allegations contained in the indictment. At the same time, it provides incentives for a court to submit to the jury theories that concededly have insufficient support in the evidence—a practice that presumably could result in significant prejudice to the defendant. Thus, the dichotomy between the standards applied to

amendments and variances appears to reverse the incentives that normally are preferred.

3. In our view, the best course would be for this Court expressly to overrule *Bain*. The Court should confirm that the Fifth Amendment right to be held to answer only on indictment by a grand jury does not require a one-to-one correspondence between the allegations in the indictment and the proof at trial; rather, it simply guarantees a defendant that he will not be forced to trial on a different offense from that charged by the grand jury. It would be appropriate for the Court to explain also that the Fifth Amendment right should not be defined in terms of speculation about whether the grand jury might have declined to indict based on evidence subsequently produced at trial. An explicit rejection by this Court of the *Bain* reasoning should prevent lower courts from concluding in the future (as the court of appeals did here) that a conviction must be reversed because the court cannot be certain about what the grand jury might have done under hypothetical circumstances.

In place of the *Bain* reasoning, the Court should limit the purpose of any retrospective matching of the proof at trial with the allegations of the indictment to ascertainment whether the defendant has, in essence, been "heard on the specific charges of which he is accused." *Dunn* v. *United States*, 442 U.S. 100, 106 (1979). That right is an important and firmly established one. See, *e.g.*, *id.* at 106-107; *Garner* v. *Louisiana*, 368 U.S. 157, 163-164 (1961); *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948); *DeJonge* v. *Oregon*, 299 U.S. 353, 362 (1937). Thus, for example, a defendant's conviction for perjury committed on one date should not be upheld when he was indicted based on statements made on another date; likewise, a defendant charged with robbing Bank A on Monday should not on the basis of that indictment be put to trial for robbing Bank B on Tuesday. In such cases it can truly be said that the defendant's Fifth Amendment right

not to be tried for an offense unless a grand jury has indicted him for that offense has been infringed.

Conversely, the interests served by the right to a grand jury indictment are fully protected when the defendant is convicted of the same offense for which he was indicted. In most cases, of course, it will be appropriate for a court also to inquire whether a defendant has suffered substantial prejudice as a result of deviations between allegations of the indictment and the proof at trial, although this inquiry is more closely related to other constitutional rights.

Whether a defendant has been convicted of the offense for which he was indicted should be determined in large part by whether the prosecutor has proved the same elements of an offense as were charged in the indictment. Thus, if the grand jury charges the elements of bank robbery, the prosecutor must prove that the defendant committed bank robbery, not that he committed, *e.g.*, arson. In addition, there must be sufficient correspondence between the description of the relevant facts in the indictment and the proof at trial, so that it is clear that, *e.g.*, the defendant is not being tried for a different bank robbery from the one charged by the grand jury. In general, however, there would not be a need for precise correspondence between the details alleged in the indictment and the proof at trial. Rather, it should be enough if the court concludes that the proof at trial relates to the same general complex of facts as that alleged in the indictment.

In evaluating whether the defendant has been convicted of the offense for which he was indicted, it is helpful to apply principles used in determining whether the indictment and the proof at trial would describe separate offenses for double jeopardy purposes. The Double Jeopardy Clause of the Fifth Amendment protects a defendant from being tried more than once for "the same offence." The inquiry in double jeopardy cases generally is "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment." *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977). See also, *e.g.*, *Sanabria* v. *United States*, 437 U.S. at 69-74; *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). If the offense for which a defendant is convicted at trial is sufficiently similar to that described in the indictment that double jeopardy would bar successive prosecutions on the two sets of facts, then it may ordinarily be concluded that the defendant has been convicted of the offense described in the indictment. Of course, this approach corresponds precisely to the double jeopardy rationale for the right to substantial congruity between indictment and proof at trial.

It is clear that under double jeopardy principles the government could not have convicted respondent of mail fraud involving a scheme that included both a knowing burglary and inflation of the value of copper he had on hand and subsequently tried him on new mail fraud charges involving the same mailings making the same monetary claim of the same victim but fraudulent only because of inflation of the value of the copper. Thus, respondent was convicted of the same offense for which he was indicted for purposes of the Fifth Amendment. Indeed, there would in our submission have been no violation of respondent's Fifth Amendment right to a grand jury indictment if he had been indicted based on a fraudulent scheme involving a knowing burglary and convicted based on proof of a scheme involving inflation of the value of the allegedly stolen copper.[24] That is because the Double Jeopardy Clause presumably would have barred the government from first prosecuting respondent for mail fraud based on a knowing burglary and then prosecuting him for mail fraud (in connection with the same mailings at issue in the initial prosecu-

---

[24] We acknowledge that this latter conclusion would seem to be at odds with *Stirone*, but we nevertheless believe it to be well supported by logic, policy, and much other of this Court's precedent.

tion) based on inflation of the value of the copper, since the two prosecutions would be for the "same offense."

It may also be useful to apply principles relating to sufficiency of the indictment in determining whether a defendant has been convicted of the offense for which he was indicted. An indictment must state "the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). However, an indictment may in addition contain collateral details that help to describe the offense. See 1 C. Wright, *Federal Practice and Procedure*, *supra*, § 125, at 386. If a particular allegation would not have been necessary to render the indictment sufficient, the prosecution's failure to prove it at trial should not be viewed as a violation of the Fifth Amendment right to indictment by a grand jury. So long as the prosecution succeeds in proving the "essential facts" necessary to constitute the offense charged, any other variation in proof should be without significance for purposes of the Fifth Amendment. See, *e.g.*, *Ford* v. *United States*, 273 U.S. at 602 (failure to prove surplusage did not constitute an impermissible amendment of the indictment).[25] Of course, in this case there is no question that the allegations concerning the knowing burglary were not needed in order to render the indictment sufficient to embrace the offense respondent was proved to have committed.

---

[25] In *Stirone* the Court indicated (361 U.S. at 218) that the government would be required to prove the specified effect on interstate commerce where one is alleged in the indictment, "even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." But as we noted above (page 30 note 17), the government's proof of an effect on commerce different from that alleged in the indictment did not mean that Stirone was convicted of an offense different from that with which he was charged; indeed, it is clear that he was convicted of the specific extortionate act identified in the indictment. At most, *Stirone* presented a problem of notice to the defendant.

The boundary between separate offenses may sometimes be difficult to define; thus, there is no easy formula that can always be applied to determine whether the prosecution has proved the same offense that was charged in the indictment. There may be a need for further clarification of the applicable standard if future cases present borderline factual situations. But in most cases it will not be difficult to determine whether the offense proved at trial is the same as that with which the defendant was charged. Thus, if a defendant were charged with disturbance of the peace, but the evidence established instead the occurrence of a criminal trespass, it would be clear that the prosecution had not proved the offense charged (compare *Garner* v. *Louisiana*, 368 U.S. at 164). On the other hand, it is quite clear in this case that the prosecution did prove the offense charged. The indictment charged the elements of the mail fraud offense (*i.e.*, a scheme to defraud and particular mailings in furtherance of that scheme), and the government proved those elements at trial. Both the indictment and the proof at trial addressed the same general complex of facts, *i.e.*, events relating to respondent's submission of an inflated insurance claim based on the alleged burglary of his business on July 14, 1981.

Once a court has made the initial determination that deviation between allegations of an indictment and proof at trial has not resulted in a defendant's being tried for an offense with which he has never been charged, it should proceed to a conceptually separate inquiry—whether that deviation nevertheless has resulted in substantial prejudice to the defendant's ability to prepare his defense. To the extent this second inquiry differs from the question whether the indictment and the proof at trial relate to the same offense, it has only limited relevance to the Fifth Amendment right to be indicted by a grand jury. The inquiry into substantial prejudice is relevant primarily to due process requirements and to

a defendant's Sixth Amendment right to notice of the charges against him. In evaluating a defendant's claim of prejudice, it would be appropriate for a court to examine not only the indictment and the proof at trial, but any information the defendant may have received through a bill of particulars, discovery, or any other source.

Respondent clearly did not suffer any substantial prejudice from narrowing of the scheme charged by the grand jury. His inflation of the amount and value of the allegedly stolen copper in connection with the filing of his insurance claim was a central feature of the relatively simple scheme charged and by itself accounted for virtually the entire pecuniary loss suffered by the insurance company, the victim of his scheme. Respondent therefore was unquestionably on notice that he should address that issue at trial. At the same time, the government's decision not to offer evidence addressed to the issue of consent to the burglary could not have prejudiced respondent; indeed, it presumably aided him by leaving him free to concentrate his energies on the issue of inflation of the amount and value of copper on hand at the time of the burglary. In these circumstances, it is clear that the government's failure to prove a knowing burglary did not violate respondent's constitutional rights. Respondent's mail fraud convictions therefore should have been affirmed.

In our view, the standards used to evaluate any deviation between the charges in the indictment and the proof at trial, whether that deviation be characterized as an "amendment," a "constructive amendment," or a "variance," should be the same. As we noted above, there is substantial conceptual overlap in these doctrines. Whatever the label, the interests at stake are served if a court concludes that the defendant has been convicted of the offense with which the grand jury charged him and has not suffered substantial prejudice from any deviation

between the indictment and the proof at trial. If anything, the standards should be less demanding in the case of amendments and constructive amendments, since they give a defendant more timely and explicit notice of departures from the allegations of the indictment and since they avoid submission to the jury of theories that concededly are not supported by sufficient evidence.

The applicable standards should not be more strict in the case of physical modification of the indictment. Physical removal of surplusage reduces the possibility of prejudice to a defendant if the indictment is given to the jury and should therefore be encouraged in such circumstances. If the court determines that a variation between the terms of the indictment and the proof at trial is permissible, there is no reason not to alter the indictment itself in order to avoid prejudice to the defendant from unnecessary allegations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

VINCENT L. GAMBALE
Attorney

NOVEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461831 10090

RESPONDENT'S

BRIEF

No. 83-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

JAMES RUAL MILLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

BRIEF FOR JAMES RUAL MILLER

JERROLD M. LADAR
Attorney At Law
507 Polk Street, Suite 310
San Francisco, CA. 94102
(415) 928-2333
Counsel for
JAMES RUAL MILLER

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

25pp

QUESTION PRESENTED

Whether the Fifth Amendment right to be held to answer only upon indictment by a grand jury requires that a court set aside a mail fraud conviction when the fraudulent scheme proved by the government at jury a trial is substantially different than the scheme alleged in the indictment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

In a three count Indictment filed June 30, 1982 James Miller was charged with mail fraud in violation of 18 U.S.C. 1341. The statute reads, in pertinent part, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . ." (is guilty of an offense).

The three counts related to one incident—a "false burglary" arranged by Miller and upon which he claimed an insurance loss. Mr. Miller owned and operated San Francisco Scrap Metal Company, a firm which contracted to purchase, strip, bale and resell scrap copper to metal dealers. On the morning of July 15, 1981 Miller reported to San Francisco police and to his insurance carrier, Aetna Insurance, a burglary of his business premises during the preceding night, resulting in the loss of two trucks and 210,170 pounds of scrap copper, worth $123,000, stored on the premises.

Miller made a claim for reimbursement for $150,000 from Aetna and submitted a sworn "Proof of Loss." Aetna paid Miller $100,000 in two equal payments of $50,000.

The Indictment alleged a single scheme and artifice to defraud by ". . . making a fraudulent insurance claim for a loss due to an alleged burglary . . ." Miller, it was claimed, increased his insurance coverage in contemplation of the burglary, "arranged" the burglary with a cooperative employee, reported the false burglary to

police, filed a sworn Proof of Loss with the insurer claiming a $153,000 loss and collected $100,000.

The Indictment stated:

> ". . . JAMES RUAL MILLER, defendant herein, being the President of San Francisco Scrap Metal Inc., did devise and intend to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and representations from Aetna Insurance Company by making a fraudulent insurance claim for a loss due to an alleged burglary at San Francisco Scrap Metal.
>
> "2. At the time such pretenses and representations were made, defendant well knew them to be false."

The Indictment further alleged that the scheme was carried out in the following manner:

> "3. It was a part of the scheme that on or about July 2, 1981, defendant would and did increase his insurance policy coverage from $50,000 to $150,000 to be in effect for a two week period ending July 15, 1981.
>
> "4. It was a further part of the scheme that on or about July 15, 1981, defendant would and did report that a burglary had occurred at San Francisco Scrap Metal during the evening of July 14, 1981.
>
> "5. It was a further part of the scheme that defendant would and did claim to have lost 210,170 pounds of copper wire, worth $123,500 and two trucks during the alleged burglary.
>
> "6. It was a further part of the scheme that defendant well knew that the alleged burglary was committed with his knowledge and consent for the purpose of obtaining the insurance proceeds.
>
> "7. It was a further part of the scheme that defendant well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company." (J.A. 2-3).

At the grand jury, the government presented the testimony of Fisher, an employee and alleged accomplice of Miller's, who told the grand jury that the "burglary" was non-existent. Fisher testified that he and Miller removed goods and two trucks from Miller's business premises and hid them, so that Miller could then claim a "burglary" and submit a false claim to Aetna for their value. Fisher's grand jury testimony and an interview statement of Fisher with the F.B.I. were furnished to defendant's counsel prior to trial and Fisher was named as a witness for trial.

As defendant's trial progressed, Fisher did not respond to the government's request for his appearance. The government, acting *ex parte*, sought and obtained a material witness warrant for him. (18 USC § 3149). He was found, arrested and brought to court. Counsel was appointed. The government obtained judicial immunity for him but then decided not to call him as a witness.

As a result, the government failed to present the key evidence at the trial to support the linchpin of the indictment—a false burglary "committed with his (Miller's) knowledge and consent for the purposes of obtaining the insurance proceeds." The government also failed to introduce any evidence to sustain any fraudulent plan by Miller to increase his insurance coverage. Only evidence relating to an inflated value for the goods taken was presented.

At the close of the government's case, the prosecutor sought Miller's consent to strike the "false burglary" allegation. Miller refused to agree, claiming that the Indictment did not state any other offense and that if the striking occurred, the proof was insufficient to allow the

case to go to the jury. The District Court denied the government's Motion to Strike.

At trial the defense sought to establish, through cross-examination and by its own witnesses, that a real burglary had occurred, in order to confront the expected alleged accomplice's testimony. Miller continually attacked the premise that the burglary was false and moved for acquittal, both before and after the jury verdict, on the ground that the scheme to defraud is the essential element of the offense charged (*Pereira* v. *United States*, 347 U.S. 1, 8 (1954)) and that the government had not proved the unitary sole scheme pleaded. The government persuaded the district court that proof of just an inflated insurance claim established the requisite scheme and the motions were denied.

Miller was convicted on counts one and two (count three had been dismissed on motion of the government before trial began). On November 10, 1982, Miller was sentenced to two years in the custody of the Attorney General. He was released on his personal recognizance pending appeal and during this proceeding.

On appeal the Ninth Circuit reversed, holding:

> ". . . the jury must find the existence of substantially the same fraudulent scheme as that charged by the grand jury. Because, as noted above, there can be no dispute that Miller's conviction was predicated on a substantially different scheme from that pleaded in the indictment, the conviction cannot stand." Pet., App. 10a

The Court of Appeals was specifically aware that the Indictment had been predicated upon Fisher's testimony to the grand jury. The Court properly concluded that without Fisher, the "scheme" was not the scheme the grand jury indicted.

SUMMARY OF ARGUMENT

Miller was charged with one mail fraud scheme comprised of increasing his insurance coverage and making a fraudulent insurance claim for a loss due to a false burglary. If the reported burglary never took place then any mailing of proof of loss to the insurance company was *per se* fraudulent and any amount claimed was a gross inflation of the loss. A claim for $1.00 is "grossly inflated" if no burglary occurred. As the record before the Ninth Circuit shows (there was no trial transcript) the scheme presented for grand jury consideration included no evidence of a grossly inflated property loss claim, except by virtue of there having been no burglary at all. Thus, on such a record, no other conclusion is rational.

The Court of Appeal held that one single scheme was charged and another proved. When the prosecutor rested the government's case without calling the chief witness, this surprised defendant and thus affected his substantial rights. He defended against a fraudulent raise in insurance and a non-existent burglary. Suddenly he was faced with combatting a different scheme. The government switched its position at the close of the case and said, "sure, the burglary occurred and the goods and trucks were taken, but you have overstated by *some* amount the value of the goods (apparently not the trucks) and *that* is the crime." This was a constructive amendment of the indictment to the detriment of the accused.

The government attempts to characterize its failure of proof as an omission to address one feature of the scheme, citing *Salinger* v. *U.S.*, 272 US 542 (1926) as "controlling." [Brief for the U.S. (hereinafter called Brief) p. 12.] Hence, the government contends that this case involved a

mere "narrowing of charges to fit the proof at trial." *Id.* p. 6. The 9th Circuit explicitly rejected that position:

> "A contrary result is not required by our cases holding that the government need not prove every fraudulent act or statement alleged in the indictment as demonstrating the fraudulent nature of the scheme charged." (J.A.App. 7a)

Instead, the Court of Appeals found that Miller's conviction "was predicated on a substantially different scheme from that pleaded in the indictment . . ." *Id* 8a. Hence, there is no expansive or original principle involved here; this case reflects only a dispute between the government and the Court of Appeals as how to categorize the conceded discrepancy between what the government charged and what it proved.

The government apparently wishes to use this case as a vehicle by which to overrule the venerable Supreme Court ruling in *Ex Parte Bain*, 121 US 1, (1887), or at least to clarify its status and the related language from *Stirone* v. *United States*, 361 US 212 (1960). (Pet. p. 12-13; Brief, p. 6-8). Although the government did not seek to clarify the record below, it now states that the Court of Appeal has departed from established precedent or is confused by *Ex Parte Bain*. The government asserts that the 9th Circuit "relied heavily" on *Ex Parte Bain*. (Brief, pp. 10 and 26) In fact the 9th Circuit cited *Bain* and *Stirone* but once, (Pet.App. 6a) and engaged in no analysis of those cases in reversing Miller's conviction, relying directly on the obvious principle which it had enunciated in *United States* v. *Mastelotto*, 717 F.2d 1238 (9th Cir. 1983):

> "[A mail fraud] defendant cannot be convicted of a count charing participation in a fraudulent scheme "Y" where the grand jury indicted on a fraudulent

> scheme "X" even if the schemes themselves overlap or are concentric."
>
> *Id.* at 1248-49.

(The Solicitor General declined to seek *certiorari* in *Mastelotto*.) The Ninth Circuit found that the government failed to prove the offense charged in the indictment. To the extent the government proved mail fraud, "it did so on a theory so different from that pleaded in the indictment that Miller's conviction cannot be sustained." (Pet, App., pp. 5a-6a)

The Ninth Circuit's decision breaks no new ground. It merely confirms the basic principle that the petit jury "must find the existence of substantially the same fraudulent scheme that was charged by the grand jury." (*Id*10a.)

ARGUMENT

The Fifth Amendment Right To Indictment By A Grand Jury Requires Reversal Of A Conviction When The Scheme Proved At Trial Was Substantially At Variance With The One Contained In The Indictment.

Neither Miller nor the Court of Appeals dispute the general rule that proof at trial need not precisely match the allegation in the indictment. There is no constitutional violation when the effect of any disparity is merely to narrow the charges against a defendant, *Salinger* v. *United States*, 272 U.S. 542 (1926), or to withdraw a part of an indictment which constitutes "surplusage" *Ford* v. *United States*, 273 U.S. 593, 602 (1927).

It is also unquestionably the rule that various means used to commit a multi-faceted mail fraud scheme may be pleaded without offending the rule against duplicity and that sufficient proof of any of the means will sustain a verdict after trial. *U.S.* v. *Zeidman*, 540 F.2d 314, 318

(7th Cir. 1976); *U.S.* v. *Outpost Development Co.*, 552 F.2d 868 (9th Cir. 1977).

We do not have here, however, what courts refer to as "a multi-faceted mail fraud scheme." *Zeidman, supra*, at 318.) The case pleaded by the government is a single "one-faceted" scheme "relatively simple compared to most." (Government's Brief, p. 19, n9.) The core is a false burglary upon which the increase in insurance, the report of the burglary to the police and the sworn Proof of Loss depend. The pleading is drawn by the government and the theory of the case set forth by them. As a general rule of construction, it is construed strictly and narrowly against the government.

The Indictment set forth with specificity the offense alleged and the means utilized; defendant prepared to meet a false burglary "scheme and artifice." Thus, the Indictment's language met the four pronged test of *Russell* v. *United States*, 369 U.S. 749, 763, 768 n.15 (1962):

1. enable the defendant to prepare his defense;

2. ensure him that he is being prosecuted on the basis of facts presented to the grand jury;

3. enable him to plead double jeopardy against a later prosecution; and,

4. inform the court of the facts alleged so that it can determine the sufficiency of the charge.

However, *Russell* was violated when the government's case concluded and the prosecutor was forced to switch theories. Having failed to produce any evidence that the increase in insurance coverage was part of any fraudulent scheme and that the burglary was false i.e., consented to by Miller or with his knowledge or cooperation, the government told the court, and ultimately argued to the

jury, that Miller had simply increased his insurance claim over what he actually lost and that *this* action was the fraud alleged, i.e., a real burglary and an inflated claim.

The prejudice to Miller is manifest. He was notified by the Indictment that the case was one involving a fraudulent increase in insurance and a false burglary—one committed by him and his employee, Fisher. From a grand jury transcript and FBI reports furnished pre-trial, this theory was memorialized by the government. As the grand jury transcript discloses, Fisher told the grand jury that he and Miller "committed" the burglary the night before it was reported, hiding the "stolen trucks" under an overpass near a freeway. The government intended to prove the false burglary scheme at trial, going so far as to have former employee Fisher arrested on a material witness warrant, brought before the court and granted immunity. Fisher was available but the government chose not to call him.

It is not a grossly inflated claim from a real burglary that is pleaded in the "scheme and artifice to defraud" on page one of the Indictment. The only "scheme and artifice" pleaded was one born from a false (alleged) burglary, one committed "with the knowledge and consent" of defendant. (J.A. 2-3). It is the scheme to defraud, not the actual fraud which is required to sustain a conviction under 18 USC 1341. *Pereira* v. *United States*, 347 U.S. 1, 8 (1954); *United States* v. *Reid*, 533 F.2d 1255 (D.C. Cir. 1976). Thus if the scheme proved differs significantly from the scheme alleged in the indictment, the defendant is misled and the variance is fatal.

No matter how long the Indictment is perused, no matter how intensely one stares at the writing, it continues to state clearly one fraudulent scheme: a false burglary and a claim thereon.

The government has great difficulty with the reasoning in *Ex Parte Bain* that amendment of an indictment is improper because one can never know whether the grand jury would have indicted on the basis of the different charges proved at trial. The Solicitor General argues:

> "*Bain* in effect reverses the established roles of the grand jury and petit jury by holding that the latter's finding beyond a reasonable doubt that the defendant committed *the* offense named in the indictment may be overturned by indulging in speculation about whether the grand jury would have declined to find probable cause on the basis of the same evidence considered by the petit jury."

Brief, pp. 7, 35 (emphasis added)

There is only a reversal of roles if we assume, as did the government in the above quoted passage, that the petit jury's finding relates to the same offense and the same evidence as to which the grand jury found probable cause.

A related inquiry is: who should be allowed to speculate and who is at risk as to what the grand jury would have determined had different evidence been presented to it? As Mr. Justice Stewart stated for this Court in *Russell* v. *United States*, 369 U.S. 749 at 770 (1961):

> "To allow the prosecutor or the court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure."

To confer this kind of latitude upon trial courts and prosecutors would reduce to a nullity the constitutional requirement that "no person shall be held to answer" except after indictment by a grand jury:

> "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."

Id. 771, citing *Stirone*, *supra at* 218

We have here a situation where the prosecution's key witness, indeed its *only* witness to support the alleged false burglary scheme, did not testify and the other underpinning of the scheme—a fraudulent raise in insurance coverage—was not proved. Thus, this case presents a situation which is best described as a trial of appellant on a pleading whose proof failed and on an attempt by the prosecution to "amend" the indictment so as to claim it charged another offense. An observation made by Chief Justice Marshall in 1812 in another context, is apt:

> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced."
>
> Marshall, C. J., *The Hoppet* v. *U.S.*, 11 U.S. 389, 394 (1812).

The Court Of Appeals Correctly Followed Established Precedent In Overturning Miller's Conviction.

The origins of the grand jury in the English common law have been traced back to the Assize of Clarendon in 1166. *Russell* v. *United States*, 369 U.S. 749 at 761 (1962). The cases often make citation to ancient authority, including Coke and the Magna Carta. This bulwark of protection and basic fairness to an individual charged with a crime is purportedly as viable today as it was at its inception.

Ex Parte Bain, 121 U.S. 1 (1887) involved a situation essentially indistinguishable from this case. The government attempted to convict Bain without proof that he had deceived the Controller of the Currency as the grand jury had charged. In *Bain* there was an actual alteration of the indictment to avoid an adverse ruling on a demurrer and then trial on an amended charge without resubmission to the grand jury. In *Miller*, the trial court allowed a constructive alteration of the indictment. We agree with the government that "an actual physical alteration of the indictment is not a sensible basis for distinguishing *Bain*." (Brief, p. 28 n.15.) The central issue is "whether the proof at trial has deviated impermissibly from the allegations of the indictment . . ." (Brief, p. 28 n.15.) Like the government, ". . . we doubt that the distinctions between *Bain* and this case afford a logical basis for a difference in results. . . . (Brief, page 29.)

The government attempts a semantic distinction between this case and *Stirone* v. *United States*, 361 U.S. 212 (1960), by asserting that the charges were "broadened" in *Stirone* while they were merely "narrowed" here. (Brief, pp. 29-30.) In *Stirone* the grand jury indictment was based upon steel shipments into Pennsylvania from other states, but the trial court permitted the government to introduce evidence respecting shipments from Pennsylvania to other states.

While the government concedes that *Stirone* prohibits a discrepancy between the charges in the indictment and the proof at trial "when those changes involve an essential element of the crime," (Brief, p. 30), its footnote 17 is especially instructive:

> "We note however that proof of a kind of interstate commerce different from that alleged in the indictment in *Stirone* did not mean that the defendant was convicted of a different offense than that charged in the indictment. Surely for instance he could not have been separately tried and twice punished for a single extortionate act that affected two different aspects of interstate commerce. Thus, while the result in *Stirone* might conceivably have been justified on the basis of prejudice resulting from unfair surprise to the defendant, we believe for reasons set forth in part C of this brief that the analysis set forther in *Stirone* is unsound."
>
> *Id.* 30 n.17.

The above quoted footnote presents a vital clue to the government's frustration and foreshadows its basic concern about this case. A discrepancy between the grand jury indictment and proof at trial might well violate a defendant's constitutional rights "on the basis of prejudice resulting from unfair surprise." However, if the discrepancy does not involve "a different offense from that charged in the indictment," double jeopardy would preclude the government from trying the defendant a second time even though he may be guilty of something. (See discussion in the next section of this brief.)

One of the purposes of grand jury indictment is to insure that a defendant will not twice be placed in jeopardy for the same offense. *Russell* v. *United States*, 369 U.S. 749, 764 (1962). The government asserts:

> "Of course, there is clearly no threat that a defendant will be placed in double jeopardy in cases like this one in which the proof at trial falls entirely within the scope of what is alleged in the indictment." (Brief, p. 33, n.19.)

The grand jury also serves other significant functions such as protecting individuals against oppressive or unwarranted criminal prosecutions [*Costello* v. *United States*, 350 U.S. 359, 362 (1956)], and providing notice to

the defendant of the charges against him so that he can prepare a defense. *Russell* v. *United States*, *supra*, at 763-766. The discrepancy between the indictment and conviction in this case, as in *Stirone*, does not amount to separate offenses. However, the constructive change in the indictment did violate Miller's rights by impeding the effective preparation and presentation of his defense. The unduly broad scope of the government's largely unproved showing to the grand jury certainly diluted Miller's defensive efforts. No doubt the rippling inuendo of the overall charge seem much more reprehensible to the grand jury as well. We do not know—and the Ninth Circuit did not know—whether any, or what, evidence was presented to the grand jury relating to the actual scrap loss. The Ninth Circuit and we do not know whether the trucks' value was substantial.

The grand jury, hearing that Miller raised his coverage and committed a false burglary, could easily have concluded that any claim whatsoever, regardless of amount, was grossly inflated. There could quite likely have been a different response if grand jury heard only a simple allegation of exaggeration of an insurance claim. If the case amounted to no more than a dispute between the insured and the insurance company as to the value of the loss, the grand jury might well have sent this case down the street to the civil courts.

The government expends considerable effort discussing the long line of cases which have applied the great principle enunciated by this court in *Ex Parte Bain*. That the lower courts have disagreed in applying *Bain* to a variety of situations, or that they have engaged in considerable analysis before determining whether changes in the terms of the Indictment were significant enough to warrant reversal (Brief, pp. 38-39), demonstrates nothing more than the kind of interpretation normally done in our system of *stare decisis*. It does not justify overruling a venerable rule fundamental to our constitutional system. As this court said in *Stirone*, *Bain* "has never been disapproved" (361 US 2176) and there is no reason to do so now. *Bain* does not "elevate the role of the grand jury above that of the petit jury." (Brief, pg. 35) Indeed, the central application of *Bain* occurs when the proof presented at trial before the petit jury differs in some substantial respect from the presentation initially made to the grand jury. *Bain* does not "set out an absolute rule against any deviation from the allegations in an indictment." *Id.*36. By now it is quite clear that:

> "Both variances in proof and actual physical amendments to indictments might be permissible in a considerable variety of circumstances." *Id.* 37

Reversal is appropriate only when the variance in proof affects the substantial rights of the defendant, [*Berger* v. *U.S.*, 295 US 78, 82 (1935)] i.e. if it subjects the defendant to unfair surprise thereby undermining his ability to defend against the charges. Certainly the government cannot dispute a defendant's fundamental right not to be convicted on a charge not made. *Garner* v. *Louisiana*, 368 US 157, 163-164 (1961); *Dejonge* v. *Oregon*, 299 US 353, 362 (1937). As this court said in *Cole* v. *Arkansas*, 333 US 196 at 201 (1948):

> "No principle of procedural due process is more clearly established than that requiring notice of a specific charge and a chance to be heard in trial."

The government concedes, as it must, that:

> "A defendant charged with robbing bank A on Monday should not on the basis of that indictment be put to trial for robbing bank B on Tuesday." (Brief, 41)

Bain said its progeny do not "require a one-to-one correspondence between the allegations in the indictment and the proof at trial." (Brief, p. 41) But the government's interpretation is far too over-reaching to preserve a defendant's fundamental rights:

> ". . . it should be enough if the court concludes that the proof at trial relates to this same general complex of facts as that alleged in the indictment." (Brief, p. 42)

The Constitutional Prohibition Against Double Jeopardy And The Basic Right To Indictment By A Grand Jury Serve Different Purposes; Thus, They Cannot Be Entirely Consistent.

The government is attempting to use this case as a vehicle for reconciling a long line of authority involving due process and the grand jury indictment with a wholly separate body of jurisprudence involving the double jeopardy clause. The government recognizes that the double jeopardy clause would bar it from first prosecuting Miller for mail fraud based on a fraudulent increase in coverage and a knowing burglary and then prosecuting him in connection with the same mailings based solely on inflation of the value of the copper. (Brief, p. 43-44)

The government then boldly leaps from this truism to its central and most pernicious contention:

> "Indeed there would in our submission have been no violation of respondent's Fifth Amendment right to a grand jury indictment if he had been indicted based on a fraudulent scheme involving a knowing burglary and convicted based on proof of a scheme involving inflation of the value of the allegedly stolen copper." (*Id.* 43)

In a footnote the government understatedly acknowledges that this conclusion "would seem to be at odds with *Stirone*." *Id.* n.24.

What the government has missed is the distinctly different inquiries in double jeopardy cases as compared with cases involving the due process right to indictment before a grand jury. The question in double jeopardy matters is "whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment." *Brown* v. *Ohio*, 432 US 161, 166 (1977). The issue raised by a significant discrepancy between charges made to the grand jury and proof adduced at trial is whether the defendant's rights to sufficient notice and to prepare an effective defense are thereby substantially and adversely affected. See discussion, *supra*.

The showing made to the grand jury and the proof upon which the petit jury determines conviction may both relate to the same offense for double jeopardy purposes. Yet, they may be sufficiently different as to impose severe disadvantage and general unfairness to the defendant. This was the case with respect to the charge, trial and conviction of James Rual Miller.

The government is hoisted by its own petard when it applies this theory to *Stirone:*

> ". . . the government's proof of an effect on commerce different from that alleged in the indictment did not mean that *Stirone* was convicted of an offense different from that with which he was charged; indeed it is clear that he was convicted of the specific extortionate act identified in the indictment. *At most Stirone presented a problem of notice to the defendant.*" Brief, p. 44, n.25 (emphasis added).

The problem of notice to the defendant indicated above is not a trivial matter. Indeed it is a central underlying rationale of the constitutional requirement for a grand jury indictment. *Russell* v. *U.S.*, *supra* 369 US 763, 766 (1962).

The government is not now asking this court to overrule *Bain* and *Stirone* as much as it is requesting that the very constitutional protection on which these cases are premised be deleted from the Bill of Rights. The doctrine sought by the prosecution here:

> "Would place the rights of the citizen which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for if it be once held that changes can be made by the consent or order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court in regard to the prerequisite of an indictment, in reality no longer exists."
>
> *Ex Parte Bain* at 10, 13, Quoted and reaffirmed in *Russell* v. *U.S.*, *supra*, at 771

When the government argues that both the indictment and the proof at trial must address "the same general complex of facts," what it really says is that the indictment must deal with the same offense:

> "The boundary between separate *offenses* may sometimes be difficult to define; thus there is no easy formula that can always be applied to determine whether the prosecution has proved the same *offense* that was charged in the indictment." (Emphasis supplied).
>
> (Brief, pg. 45)

Thus, according to the government, a defendant guilty of some offense, even a quite different one from that constituting the basis of the grand jury's indictment, should be convicted. If the government is barred by the principle of double jeopardy from retrying the individual, then latitude must be afforded in the first trial regardless of

the unfairness and prejudice to the defendant's ability to prepare his defense.

The petit jury in Miller found him guilty of inflating his claim to the insurance company. No matter that there was no fraudulent scheme to increase insurance coverage or to concoct and carry out a false burglary. No matter that the charge centered upon a false burglary and required him to defend against that premise. No matter that the crucial—indeed sole—witness against him was not called. Since double jeopardy would bar Miller's retrial on the same offense, the prosecution, Kafka-like, urges this court to dispense with Miller's due process rights and to reaffirm his conviction. In the course of doing so, this Court is also asked to take the drastic step of abrogating a vital principle of our constitutional jurisprudence.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Jerrold M. Ladar
JERROLD M. LADAR
Attorney for
JAMES RUAL MILLER

REPLY

BRIEF

No. 83-1750

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1750

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES RUAL MILLER

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In our opening brief we argued that the Fifth Amendment right to indictment by a grand jury does not support the reversal of respondent's mail fraud convictions on the ground that the fraudulent scheme the government proved at trial was narrower than the description of the scheme contained in the indictment. Nothing in respondent's answering brief refutes our position.

1. In the first section of our opening brief (at 11-25), we explained that this case is controlled by *Salinger* v. *United States*, 272 U.S. 542 (1926), and subsequent cases that have held that the government's proof at trial need not match the allegations in the indictment when the effect of any disparity is merely to narrow the charges against a defendant. The indictment in this case charged that respondent used the mails in furtherance of a fraudulent scheme to obtain money from his insurance company as a result of an alleged

burglary of his business. The means specified by the indictment for carrying out this scheme involved both consent to the burglary and gross inflation of the loss suffered as a consequence of the burglary. At trial, the government proved all the elements needed to convict for mail fraud, including, as described in the indictment, a fraudulent scheme involving respondent's submission of an insurance claim reflecting gross inflation of the amount of copper on hand at the time of the alleged burglary; however, the government's evidence did not establish that respondent had engineered the alleged burglary.[1] Under *Salinger*, that narrowing of the charges concerning the fraudulent scheme did not constitute any violation of respondent's right to be indicted by a grand jury.

Respondent does not join issue with our argument on this point. Instead, he proceeds from a premise that is entirely inconsistent with the facts of this case. He asserts (Br. 7-8) that the indictment charged *only* a false burglary, and almost entirely ignores the charge that in submitting his insurance claim respondent grossly inflated the amount of copper he had on hand at the time of the alleged burglary. Respondent implies (*id.* at 4, 5, 11, 19) that the grand jury

---

[1]Contrary to respondent's suggestion (Br. 8-10, 19), the allegation that he consented to the burglary he reported can hardly be viewed as a crucial part of the offenses charged in the indictment. The essential elements of those offenses were the mailing of a particular false "proof of loss" and causing the mailing of a check for $50,000 that represented partial payment of the false claim pursuant to a fraudulent scheme. The central feature of the alleged scheme was the filing of a false insurance claim that would cause the insurance company to pay respondent money to which he was not entitled. Proof that respondent had grossly inflated the amount of copper he had on hand was clearly sufficient to establish the existence of such a scheme.

Citations to respondent's answering brief refer to the typescript version of that brief. At the time this reply brief was prepared, respondent's brief had not yet been printed.

heard no evidence that would support the allegation that he had grossly inflated the amount of copper on hand, but only evidence relating to a false burglary.[2] Under respondent's version of the proceedings in this case, the prosecutor at trial suddenly concluded that he would be unable to obtain a conviction on the false burglary theory and abruptly changed to a different theory involving gross inflation of the amount of copper respondent had on hand at the time of a genuine burglary.[3] According to respondent (*id.* at 9-10, 18), this sudden change in the government's theory resulted in unfair surprise and prejudice.

Respondent's version of the proceedings in this case bears no relation to reality. The indictment on its face not only charges that respondent consented to the alleged burglary of his business, but alleges specifically in paragraphs 5 and 7 of count one that respondent "would and did claim to have lost 210,170 pounds of copper wire, worth $123,500," although he "well knew that the amount of copper claimed to have been taken during the alleged burglary was grossly inflated for the purpose of fraudulently obtaining $150,000 from Aetna Insurance Company" (J.A. 3). Clearly then, the gross inflation theory was not the product of the prosecutor's creativity at trial; rather, it was an allegation expressly put forward by the grand jury itself. And since the indictment provided clear notice of the

---

[2]We address respondent's contentions regarding the evidence presented to the grand jury at pages 9-11, *infra*.

[3]It is unclear why respondent characterizes the government's proof at trial as relating to a real burglary (see Resp. Br. 9). The government introduced some evidence that suggested that respondent might have engineered the alleged burglary, including evidence that respondent increased his insurance coverage significantly for the two-week period ending July 15, 1981, and misrepresented the reasons for doing so. This evidence tended to suggest that the alleged burglary was not genuine, but was not sufficient to prove that fact.

allegation, the government's proof at trial could not have resulted in any unfair surprise to respondent.

In fact, there is no indication in the proceedings prior to and during trial that respondent was prejudiced in any way by the prosecution's failure to prove that he was complicit in the alleged burglary. Respondent never requested a bill of particulars, thus, he had no basis for believing the government would abandon any attempt to prove the allegation that he had grossly inflated the amount of copper he had on hand. Indeed, he had every reason to know that this would be a central feature of the proof at trial. The Assistant United States Attorney who tried this case advises us that a month and a half before trial, he provided respondent with lists of exhibits and witnesses the government planned to produce at trial, and that respondent also received Jencks Act materials prior to trial, including any copies of reports of FBI interviews and grand jury testimony of witnesses who eventually testified for the government at trial. The prosecutor's trial brief summarized the government's evidence concerning the amount of copper respondent had on hand at the time of the alleged burglary. These materials unquestionably put respondent on notice that much of the government's proof would focus on whether respondent could have had on hand the amount of copper he reported to the insurance company as stolen.

The prosecutor's opening statement at trial (Tr. 8-11)[4] included no reference to a false burglary allegation; the

[4]"Tr." refers to the transcript of the trial proceedings, which we are lodging with the Clerk of the Court. Counsel for the parties agreed at the court of appeals stage to stipulate to the facts in lieu of ordering a transcript. After certiorari was granted, we requested preparation of a transcript of the trial proceedings, in part because respondent's statements about prejudice in his brief in opposition were inconsistent with the prosecutor's recollection of the events at trial.

In a telephone conversation with a member of respondent's counsel's firm prior to the filing of our opening brief, we indicated that we did not plan to cite the transcript in that brief, but that we would feel free to refer to it if respondent's answering brief made representations about what had taken place at trial. In view of the claims of unfair surprise and prejudice that respondent has made in his answering brief, we believe it is appropriate for us to respond on the basis of our examination of the trial transcript. We are also lodging with the Clerk of the Court copies of some of the materials that the Assistant United States Attorney advises us that he provided to respondent's counsel before trial. We note, however, our view that it is clear without reference to the transcript or the materials provided to respondent that respondent could not have been prejudiced by the government's failure to prove the false burglary allegation at trial.

statement summarized the anticipated testimony of individuals who sold copper to, or bought it from, respondent around the time of the alleged burglary and of respondent's employees concerning the amount of copper he had on hand at the time. The cross-examination of those witnesses (*e.g.*, Tr. 68-75, 89-95, 109-129, 133-137, 151-156, 201-206, 238-242) and respondent's counsel's own attempts to introduce testimony on that subject (*e.g.*, Tr. 259-267, 282, 289-292, 314-316) demonstrate that he was fully prepared to address the prosecution's proof. Although he contended at the close of all the evidence that respondent should be acquitted because of the prosecution's failure to establish consent to the alleged burglary (see J.A. 5-6), respondent's counsel did not even suggest to the trial court that the failure to prove that allegation of the indictment had somehow interfered with his ability to prepare his client's defense. Indeed, it is more likely that the government's failure to offer convincing proof on the false burglary point benefited respondent's counsel by allowing him to concentrate his attention on the issue of inflation of the amount of copper on hand. Respondent's counsel never requested a continuance, which would have been the logical remedy had he been surprised by unforeseen developments at trial.

It is true that the prosecutor chose not to introduce the testimony of Robert Fisher (one of respondent's employees), whose testimony before the grand jury supported the allegation of false burglary.[5] But that decision does not signify some extraordinary or improper departure from the indictment. As we noted in our opening brief (at 19), it is commonplace for some anticipated evidence to become unavailable prior to trial, or for the prosecutor to make the judgment that it is preferable not to introduce certain testimony if he is satisfied that the remaining evidence is clearly sufficient to prove the offense.[6] Cf. *Luce* v. *United States*, No. 83-912 (Dec. 10, 1984), slip op. 4. If respondent's counsel focused his preparation on the false burglary allegation, he was taking a substantial risk that the government would not undertake or be able to prove that the insurance company was defrauded by the other means alleged in the indictment.

Respondent recognizes (Br. 7-8) that under *Salinger* and subsequent cases there is no constitutional violation when the proof at trial merely narrows the charges of the indictment. Thus, it is understandable that he seeks to remove this case from the reach of that principle. But it is clear that this case does involve a narrowing of the charges and that the court of appeals understood it as such. See J.A. 8; 715 F.2d at 1363 (initially describing respondent's conviction as predicated on a "substantially narrower scheme than that pleaded in the indictment"). Respondent implicitly acknowledges that this is so when he describes the court of appeals as

---

[5]Fisher testified before the grand jury that the night before the alleged burglary respondent had asked him to drive one of respondent's trucks from his place of business and leave it under a bridge.

[6]Respondent himself implicitly acknowledges that the government may have had good reason not to present Fisher's testimony in this case. Respondent's description of the difficulties the prosecutor experienced in obtaining Fisher's presence at trial (see Resp. Br. 3, 9) suggests that Fisher would have been a reluctant witness at best.

relying in this case on the proposition stated in its decision in *United States* v. *Mastelotto*, 717 F.2d 1238, 1248-1249 (9th Cir. 1983) — that a mail fraud conviction may be overturned when the scheme alleged in the indictment and the scheme proved at trial are "concentric." See Resp. Br. 6-7. The "obvious principle" (*id.* at 6) stated in *Mastelotto* and applied in this case is directly contrary to this Court's decision in *Salinger*.

2. Respondent urges (Br. 15-16) that *Ex parte Bain*, 121 U.S. 1 (1887), established a "venerable rule" that governs this case. He nowhere acknowledges this Court's recent statement that *Bain* "was long ago limited to its facts by *Salinger* v. *United States*." *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 2 n.2. We suggested in our opening brief that *Bain* should be expressly overruled because its reasoning does not withstand scrutiny and because it has fostered confusion in the lower courts. Respondent's conclusory denials do not serve to rebut those points.

We also explained in our opening brief (at 29-30) that this case can be distinguished from *Stirone* v. *United States*, 361 U.S. 212 (1960), on the ground that *Stirone* involved broadening, rather than narrowing, of the charges of an indictment. We noted further that the analysis in *Stirone* appeared unsound, in part because, as in *Bain*, the Court relied on speculation about whether the grand jury conceivably might have chosen not to indict if it had considered only the evidence eventually presented at trial. See U.S. Br. 30 n.17, 44 n.25. We contended (*id.* at 42) that there is no violation of a defendant's right to be indicted by a grand jury when he is convicted of the same offense for which he was indicted. We suggested (*id.* at 42-45) that in ruling on such claims a court might consider, among other things, principles used in determining whether the indictment and

the proof at trial would describe separate offenses for double jeopardy purposes or principles relating to sufficiency of the indictment. We questioned the Court's conclusion that Stirone's right to be indicted by a grand jury had been violated, since proof of a kind of interstate commerce different from that alleged in the indictment did not mean that Stirone was convicted of a different offense from that charged in the indictment. We noted, however, that the result in *Stirone* might conceivably have been justified on the basis of prejudice resulting from unfair surprise to the defendant. U.S. Br. 30 n.17.

Respondent acknowledges (Br. 14) that in this case, as in *Stirone*, the discrepancy between the indictment and the conviction "does not amount to separate offenses." He claims, however, that we have improperly attempted to equate the right to indictment by a grand jury with the prohibition against double jeopardy (Resp. Br. 16-20). He insists that the key inquiry in connection with the Fifth Amendment right to be indicted by a grand jury is whether the defendant has been unfairly surprised by such a discrepancy; and he accuses us of ignoring that inquiry (*id.* at 14, 18-20).

Respondent mischaracterizes our contentions. We do not argue that the right to indictment by a grand jury serves the same function as the prohibition against double jeopardy (although this Court has itself suggested that these two rights bear some relation to each other, see *Russell* v. *United States*, 369 U.S. 749, 764 (1962)). Rather, we have suggested that principles developed in double jeopardy cases may provide guidance to a court that is attempting to determine whether the prosecution has proved at trial an offense different from that charged in the indictment. Nor do we contend that courts should ignore the issue of prejudice. We stated expressly in our opening brief (at 45-46) that a court should examine the question of unfair surprise when

it considers a discrepancy between an indictment and the proof at trial. As we there noted, however, the inquiry into prejudice is relevant primarily to due process requirements and a defendant's Sixth Amendment right to notice of the charges against him, rather than his Fifth Amendment right to be indicted by a grand jury. Of course, as discussed in the previous point, there is no possibility here that respondent could have been unfairly surprised by the prosecutor's decision to focus his proof on a part of the allegations relating to respondent's fraudulent scheme, since the indictment put him on notice that he should be prepared to meet the "gross inflation" allegation as well as the false burglary allegation.

3. Respondent strongly implies at several points in his answering brief (at 4, 5, 11, 19) that the grand jury heard evidence only of false burglary, while the petit jury heard evidence only of respondent's gross inflation of the amount of copper on hand.[7] In support of that assertion, respondent cites the fact that at trial the prosecutor decided not to call Robert Fisher, whose testimony before the grand jury supported the false burglary allegation of the indictment (see page 6 & note 5, *supra*).

Even if respondent were correct that the grand jury and the petit jury heard entirely different evidence, that would not amount to a violation of the Fifth Amendment right to be indicted by a grand jury. As we explained in our opening brief (at 20-21), this Court has held that the grand jury may

---

[7]Respondent's contentions on this point are not entirely consistent. Contrast Resp. Br. 5 (record before the court of appeals showed that "the scheme presented for grand jury consideration included no evidence of a grossly inflated property loss claim, except by virtue of there having been no burglary at all") with *id.* at 14-15 (court of appeals did not know "whether any, or what, evidence was presented to the grand jury relating to the actual scrap loss"). In fact, the record before the court of appeals did not reveal which witnesses had testified before the grand jury or the content of that testimony.

base its decision to indict on evidence that could not be presented at trial. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338 (1974); *Costello* v. *United States*, 350 U.S. 359 (1956). That principle derives in large part from the function of the grand jury in our system: "The grand jury does not sit to determine the truth of the charges brought against a defendant, but only to determine whether there is probable cause to believe them true, so as to require him to stand trial." *Bracy* v. *United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, Circuit Justice). Respondent's suggestion that this Court should look behind an indictment that is valid on its face in order to determine whether the evidence presented to the grand jury differs significantly from evidence presented at trial is entirely out of line with this Court's precedents.

In any event, respondent's premise concerning the evidence before the grand jury is simply unfounded. Indeed, respondent clearly knew that there were at least five witnesses other than Fisher who appeared before the grand jury, since the government provided respondent's counsel with transcripts of the grand jury testimony of those witnesses. Two of those witnesses, Charles Schwartz and William Harmon, testified both before the grand jury and at trial concerning the amount of copper respondent had on hand at the time of the alleged burglary, and respondent's counsel used the grand jury transcripts in cross-examining Schwartz and Harmon at trial (Tr. 110-113, 204-205). As we noted in our reply brief at the petition stage (at 4 n.3), much of the evidence before the grand jury was presented through the testimony of the FBI case agent, who described what he had learned from individuals who eventually testified at

trial.[8] Thus, respondent's contentions concerning the evidence before the grand jury are not only irrelevant; they are also inconsistent with what actually transpired in this case.[9]

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1985

---

[8]Respondent did not receive a copy of the transcript of the case agent's grand jury testimony, since the agent did not testify for the government at trial.

[9]We are lodging with the Clerk of the Court copies of the transcripts of the grand jury testimony in case the Court should wish to consult them in connection with respondent's suggestion concerning the evidence before the grand jury. The Court may also wish to consult the transcripts in connection with respondent's description of Fisher's grand jury testimony (Resp. Br. 2-3, 9); that description goes considerably beyond what Fisher actually said before the grand jury. However, we reiterate that the nature of the evidence before the grand jury has no relevance to the issues in this case, so that it should be unnecessary for the Court to refer to any of the grand jury transcripts.

DOJ-1985-01